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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-261

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

KAYSER-ROTH CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, the Textile Workers Union of America, AFL-CIO,[1] respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 31, 1973.

1. Hereafter "TWUA" or "Union".

Opinions Below

The Opinion of the Court of Appeals is not yet reported officially, but is reported unofficially at 83 LRRM 2466 (1973) and is printed in the Appendix at page 1a.

The Opinion of the District Court for the Eastern District of Tennessee is reported at 347 F.Supp. 801 and at 81 LRRM 2185 and is printed in the Appendix at page 10a.

Jurisdiction

The Judgment of the Court of Appeals is dated May 31, 1973 and was entered on that date. This Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. In light of Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106), can the Union be held liable for unlawful acts committed by individuals, where the Union from the beginning of the strike urged the strikers that their only hope was to be non-violent and law-abiding, and where there is no "clear proof" of Union participation in and authorization or ratification of such acts?

2. Can an Employer which has been found by the court of appeals and by the National Labor Relations Board repeatedly to have violated the National Labor Relations Act, in order to deprive its employees of their right to union representation, and which has specifically been found

by the court of appeals and the Board to have forced its employees to strike, by the Employer's violations of the law, collect damages from the Union because of strike conduct which could not have occurred without the Employer's unlawful conduct which compelled the strike?

Statutory Provisions Involved

United States Code, Title 29:

§106. No officer or member of any association or organization participating or interested in a labor dispute, shall be held resposible or liable in any court of the United States for the unlawful acts of individual officers, members or agents except on clear proof of actual participation in ,or actual authorization of such acts, or of ratification of such acts, after actual knowledge thereof.

§158(a)(1), (3), (4) and (5):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or

the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement of the Case

This case is a damage suit by Kayser-Roth Corporation (the Respondent Employer)[2] against Textile Workers Union of America, AFL-CIO (the Petitioner Union) arising from a strike which occurred in Dayton, Tennessee, in 1968.

2. Hereafter "Kayser-Roth", "Employer" or "Company".

The jurisdiction of the district court was invoked (on removal) because the original complaint alleged a violation of the secondary boycott provisions of the Taft-Hartley Act, 29 U.S.C. §158(b)(4), and jurisdiction of the district court therefore arose under 29 U.S.C. §187.

Although the district court found no Union violation of Taft-Hartley, it held (and the court of appeals sustained the decision) that it had pendant jurisdiction of the state claims which remained as the sole remaining cause.

Kayser-Roth employees in Dayton sought Union representation in 1964. The response of the Employer was to attack the employees with massive and pervasive unfair labor practices. In the several unfair labor practice cases (ultimately consolidated) which resulted from that campaign, the Employer was found guilty of extensive violations of Sections 8(a)(1), (3) and (4) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3) and (4). *Kayser-Roth Hosiery Co., Inc.*, 166 NLRB 372 (1967). The Company's violations included discharging employees for engaging in lawful union activity, discharging employees because of their giving testimony in a National Labor Relations Board proceeding, threatening to discharge employees and threatening to close the plant. The Company spied upon its employees, harassed them for participating in the organizing efforts of the Union, unlawfully interrogated them, and threatened withdrawal of privileges and the loss of opportunity for advancement because of union activities —among other violations.

These unfair labor practices delayed certification of the Union as the employees' collective bargaining representa-

tive for three years, until 1967. Certification of the Union by the federal government did not put an end to the Company's unlawful activity; the Company only shifted into its own Phase II. It began an eight-month program of bad-faith bargaining. The National Labor Relations Board and the United States Court of Appeals for the Sixth Circuit found that the Company had engaged in a course of bad-faith bargaining in violation of section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5), *and found that the Company's violations of the National Labor Relations Act were the cause of the employees' being driven to strike. Kayser-Roth Hosiery Co.* v. *NLRB,* 430 F.2d 701 (6th Cir. 1970), affirming 176 NLRB 999 (1969).

On Sunday, May 5, 1968[3] approximately 200 to 350 of the employees met to consider a final contract offer of the Company—the offer found by the Board and the court to be the fruit of bad-faith bargaining. The offer was rejected and a motion was made by one of the employees to go out on strike the next day. The motion was unanimously adopted (Finding of Fact No. 4). TWUA's representatives had not prepared for the May 6th strike (Tr. 1045; JA 394)[4] for they did not desire or recommend to the workers that they pursue such a course of action (Tr. 1042, 1201; JA 394, 420-421). To the contrary, TWUA made it very clear to the employees at that meeting that the decision to strike was to be made by them (Tr. 1241; JA 426). The employees were determined to strike regardless of the advice of the Union representatives, and the Union was faced with the

3. All dates refer to 1968 unless indicated otherwise.

4. References marked "Tr." are to the transcript; those marked "JA" are to the Joint Appendix to the Court of Appeals.

choice of trying to control the strike or of abandoning years of frustrated organizational efforts.

By this time the Company had engaged in four and one-half years of unfair labor practices against its employees. The entire town of Dayton was in a state of outrage. The employees were the most outraged, as was demonstrated by their unanimous vote to strike and by the small number of employees who scabbed. The outrage of other citizens is demonstrated by numerous instances found by the district court of the city and county police not seeing unlawful conduct, and of the police choosing to arrest the Employer's ally truck drivers when disputes arose between them and pickets.

There is no contradiction of the fact that from the first meeting at which the strike was voted the Union's three agents on the scene (Vice-President Adolph Benet and International Representatives Ted Benton and Walt Rainey) repeatedly told the strikers that non-violence was essential to the strike, not only because violence was unlawful but also because the strike could not succeed without community goodwill. There is no contradiction of the fact that after rioting by the strikers on June 24th and June 25th, Mr. Benet told the strikers that he was gravely disappointed by the riots and that "if anything like that occurred again that this union would pull out of the situation * * * there was need to listen to the leadership of the union and that we could not go on like this" (Tr. 1181; JA 419-20).

Finally, then, these instructions were followed. The incidents ceased.

Prior thereto, despite instructions from the Union, numerous instances of violence and unlawful conduct occurred.

The question is not whether unlawful conduct occurred, but rather whether the Union is properly held responsible for it.

The court of appeals found that the employer did meet the Norris-LaGuardia burden of "clear proof of actual participation in, or actual authorization of such [unlawful] acts, or of ratification of such acts, after actual knowledge thereof," because of a catalog of facts. The complete catalog (from pp. 3-5 of the slip opinion, pp. 4a-6a in the Appendix to this Petition) is as follows:

1. "[U]nion officials personally participated in, observed, supervised and controlled the activities of the strikers. They leased property adjacent to the plant site for use as strike headquarters; a mobile office was moved onto this property, and a shelter for the strikers was also provided."

2. "[International Representative] Benton instructed the pickets to walk in such a manner as to make entrance to the plant difficult."

3. "[International Representative] Rainey instructed them that they should stop non-strikers from entering the plant by any means they could, including stripping off their clothes."

4. Benton was at the picket line full-time and Rainey half-time supervising strike activities. "During this period, numerous acts of extreme violence occurred. * * *"

5. "Rainey and Benton observed a group of strikers while they blocked, stoned, and in some cases overturned vehicles bearing non-strikers. * * *"

6. Benton "was aware of systematic daily implantation and re-implantation of nails and broken glass on company driveways. * * *"

7. "Benton personally directed the strikers to jam the buses to prevent boarding by non-strikers."

8. "[T]he plant was closed on June 24, 1968. Thereafter, the striking employees effectively prevented its reopening until September 16, 1968."

9. "[T]he union * * * promised to protect the strikers against charges of criminal activities."

10. "The union provided bail bonds and defense counsel for all strikers who were arrested, all but one of whom pleaded guilty, and all of whom were convicted. Forty-three strikers, including Benton and Rainey, were charged with and were convicted of criminal contempt for failure to abide by the state court injunctions; all were represented by union counsel."

11. "The union paid over $167,000 in attorney's fees and over $155,000 was spent on strike benefits, appeal bonds and fines."

12. "[T]he union * * * continued to pay strike benefits to strikers who pleaded guilty to criminal charges and it provided free counsel and paid the fines of all strikers who

were arrested and charged with criminal conduct or criminal contempt."

13. "Benton * * * congratulated some of the strikers for a job well done in closing down the plant."

14. "In its widely distributed magazine, the union boasted that, 'when they get angry enough to do things here in Tennessee they go all the way. The strike is 100% effective. The hosiery factory in Dayton seems to have been "struck by a plague" * * *.' " (Exhibit 41, "A Struggle for Justice," 29 *Textile Labor* 3 (1968))

15. "The union wrote various union confederates letters in which it was stated that even though the company had attempted to continue plant operations, 'we have the soldiers to win this battle,' and that the union had 'frustrated every move' the company made."

Each of the items in this catalog fairly reflects findings of fact by the district court judge, except for the items numbered 9, 10 and 15.

As to item 9, in fact there was no finding by the district court remotely like the court of appeals' conclusion that "the union promised to protect the strikers against charges of criminal activities," and no such evidence. Nor was there any finding that any of the Union's agents so promised, or any such evidence. There was a finding (in Finding of Fact No. 4) that Benton "gave instructions that the Union would provide bail in the event strikers were arrested in connection with the strike." The creation that the Union "promise[d] to protect them [the strikers] against charges

of criminal activities" comes out of the Employer's brief to the court of appeals (page 43), not out of any finding by the district judge, or any evidence in the case.

As to item 10, there is no Finding of Fact, and there was no evidence, and it is *not* the fact, or close to the fact, that "all" strikers who were arrested were convicted. This, again, is a creature of the Employer's brief (again, p. 43).

As to item 15, the letter was written by Benton, not by "the Union." (Exhibit 61, Tr. 962-63).

Reasons for Granting the Writ

I

The survival of workers' rights to organize, and of labor organizations as institutions, in industries which flout the National Labor Relations Act, requires the protection of Section 6 of the Norris-LaGuardia Act. That provision is constantly being eroded—as it has been in this case—by court decisions in conflict with the applicable decisions of this Court. In hostile territory the survival of unions and of the right to organize thus requires that this Court sustain Section 6.

There is a pattern of massively unlawful employer behavior in the textile industry in the South. This pattern was observed and described by congressional committees in 1968 and 1961.[5] In the J.P. Stevens chain the pattern has been found over a ten-year period continuing to this

5. Special Subcommittee on Labor, House Committee on Education and Labor, 90th Cong., 2d Sess., National Labor Relations Act Remedies: The Unfulfilled Promise (Comm. Print 1968); Subcommittee on National Labor Relations Board, House Committee on Education and Labor, Administration of the Labor-Management Relations Act by the NLRB (Comm. Print 1961).

date in a series of twelve NLRB and circuit court cases[6] and in one contempt of court case.[7] The pattern has been found by this Court among others in the *Darlington* case,[8] where the chain employer in 1956 shut down one entire plant in order to "chill" unionism at its other plants, and where the discriminated-against employees have not to this day received the first penny of the back wages which have been held to be due them.

The pattern was found at this very Kayser-Roth plant by the Sixth Circuit and by the NLRB not only in the pre-

6. Stevens I: *J.P. Stevens & Co., Inc.*, 157 NLRB 869, enf'd with modifications, 380 F.2d 292 (2d Cir., 1967), cert. den. 389 U.S. 1005.

Stevens II: *J.P.Stevens & Co., Inc.*, 163 NLRB 217, enf'd 388 F.2d 896 (2d Cir., 1967), cert. den. 393 U.S. 836.

Stevens III: *J.P. Stevens & Co., Inc.*, 167 NLRB 266, enf'd with modifications, 406 F.2d 1017 (4th Cir., 1968).

Stevens IV: *J.P. Stevens & Co., Inc.*, 167 NLRB 258, enf'd with modifications, 406 F.2d 1017 (4th Cir., 1968).

Stevens V: *J.P. Stevens & Co., Inc.*, 171 NLRB 1202, enf'd 417 F.2d 533 (5th Cir., 1969).

Stevens VI: *Black Hawk Corp.*, 177 NLRB 944, enf'd in part and den. in part, 431 F.2d 900 (4th Cir., 1970), cert. den. 401 U.S. 911.

Stevens VII: *J.P. Stevens & Co., Inc.*, 179 NLRB 254, enf'd 441 F.2d 514 (5th Cir., 1971), cert. den. 78 LRRM 2464.

Stevens VIII: *J.P. Stevens & Co., Inc.*, 181 NLRB 666, enf'd in part and den. in part, 449 F.2d 595 (4th Cir., 1971).

Stevens IX: *J.P. Stevens & Co., Inc.*, 183 NLRB No. 5, enf'd 461 F.2d 490 (4th Cir., 1972).

Stevens X: *Black Hawk Corp.*, 183 NLRB No. 34.

Stevens XI: *J.P. Stevens & Co., Inc.*, 186 NLRB No. 34, enf'd, Summary Calendar No. 71-1565, 5th Cir., Dec. 2, 1971.

Stevens XII: *J.P. Stevens & Co., Inc.*, 190 NLRB No. 139, remanded for consid. of remedy, 82 LRRM 2471 (D.C. Cir., 1973).

7. *NLRB* v. *J.P. Stevens & Company, Inc.*, 464 F.2d 1326 (2d Cir., 1972), cert. den. 82 LRRM 2597.

8. *Darlington Mfg. Co.*, 139 NLRB 241 (1962), enf. den. 325 F.2d 682 (4th Cir., 1963), rev'd 380 U.S. 263 (1965), supp. decis. on rem. 165 NLRB 1074 (1967), enf'd 397 F.2d 760 (4th Cir., 1968), cert. den. 393 U.S. 1023 (1969).

strike cases previously referred to, but also in a case wherein the Board and the court found the employer continuing its pattern of discrimination after the employees had ended their strike.[9]

The pattern is one of total disregard for the law whenever violation of the law is what is necessary to deprive employees of unionization.

Under the National Labor Relations Act, there are two steps to the pattern: (1) the step of trying to prevent employees from voting for the union—by threats, espionage and discharges; (2) if step one fails, the step of bargaining in bad faith. These two steps in the pattern were recently publicly discussed by NLRB Chairman Edward B. Miller, who said: "About three years ago I * * * mentioned that the bulk of [the NLRB's] work was still composed, as it had been for years, of the 8(a)(1), 8(a)(3), and sometimes 8(a)(5), cases arising out of union organizational campaigns. I referred to those cases as a dreary parade. * * * That parade continues [to this day]."[10]

In the instant case the Employer has added a third step to the pattern: the step of causing an employee strike, while outraging the entire community, by the series of employer law violations, and then, when individuals finally explode into violence, suing the Union for the torious conduct of individuals. The Employer has been awarded more than a million dollars in damages against the Union because of individuals' unlawful conduct.

9. *Kayser-Roth Hosiery, Inc.*, 187 NLRB No. 76 (1970), enf'd in part 447 F.2d 396 (6th Cir., 1971).

10. Address by NLRB Chairman Miller, "Is the NLRB Still Alive?," before the Texas Bar Association, Fort Worth, Texas, July 6, 1973, NLRB Release R-1293.

The first two steps deprive individual workers in the conspiring industry of their rights to unionization. The third step goes a degree further, and seeks to wipe out unions as institutions.

It was precisely to prevent this kind of destruction of labor organizations that Section 6 of Norris-LaGuardia was originally enacted:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents except on clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts, after actual knowledge thereof. (29 U.S.C. §106).

This Court has consistently enforced Section 6 as Congress wrote it, particularly emphasizing the crux of the section—its provision that agency is not enough; that even where *an agent* of the union has committed an unlawful act, that act may not be imputed to the union without "clear proof" of *actual* participation, authorization or ratification:

> the requirement of "authorization" restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that *the particular act charged, or acts generally of that type and quality,* had been *expressly* authorized, or *necessarily* followed from a granted au-

> thority, by the association or nonparticipating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence. (Italics added) *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 406-407 (1947).

The Court's decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and *Ramsey* v. *United Mine Workers*, 401 U.S. 302 (1971), were in accord, although they did not focus on the crucial question of the effect of an unlawful act by an agent of the union.

Perhaps as a result of the fact that there has been no recent focus by this Court on the agency question, other courts have begun to tiptoe back to common law agency, as though Congress had never provided the Norris-LaGuardia protection. A recent *Labor Law Journal* study observes:

> [C]urrent judicial interpretations have confused and misused this provision [Section 6] to the extent that it is now almost without its intended purpose, and meaningless. * * * the courts are upsetting the very fine balance which has been established between labor and management. The scales are tipping back towards management. Like the chameleon, the form of Section 6 of Norris-LaGuardia has remained the same, but the 1973 color of this provision is one which would be unrecognizable to those familiar with the 1932 shade.
>
> * * *
>
> In *Riverside Coal Co.* v. *United Mine Workers* [410 F.2d 267 (6th Cir., 1969)], * * * the Court stated, "The recounting of the evidence clearly indicates that UMW's agents were actually involved in the threats of violence which took place. * * * In view of the authorities and evidence, UMW must be said to have 'partici-

> pated in' or 'actually authorized' the acts of its appointed agents. * * * thus, the requirements of Section 6 have been met * * *"
>
> In spite of seeming reliance on the "authorities," this court seemed to narrow the meaning of Section 6 in a way not previously done. Here, the court found clear proof of the acts themselves, but the evidence fails to show clear proof of UMW's authorization or ratification * * *. The court seemed content with evidence showing that an agent, acting in the union's name, to accomplish a union end, was thus acting for that union. This is equivalent to the pre-Norris-LaGuardia practice of some courts of broadly construing the words "authorized" and "ratified." Adler, *Section 6 of the Norris-LaGuardia Act: The Chameleons Are Coming,* 24 Lab.L.J. 131, 132, 135 (1973).

The problem of the erosion of Norris-LaGuardia is not limited to the *Riverside Coal* case and the instant case. It is acute throughout the Tennessee-Kentucky area. In *Ritchie* v. *United Mine Workers of America,* 410 F.2d 827 (6th Cir., 1969), the district court had been so ready to find Section 6 satisfied that it did so with no showing even of agency, and thus was reversed even by the agency criterion of the Sixth Circuit.

Similarly, in *Varner* v. *United Rubber Workers Local 641,* 79 LRRM 2233 (Tenn. Ct. of App., Mid. Sec. 1971), the Tennessee Court of Appeals for the Middle Section had to correct the Tennessee Circuit Court on the same Norris-LaGuardia point. The Circuit Court had found the local union liable essentially upon the basis of its officers' participation in unlawful conduct. The Court of Appeals cited Section 6 and *United Brotherhood of Carpenters, supra,* to instruct the lower court that unlawful acts by union officers

or agents do not establish union liability in the absence of clear proof of the union's actual participation, authorization or ratification.

Unfortunately, in *Robinson* v. *Teamsters Local 519*, 73 LRRM 2256 (Tenn. Ct. of App., East. Sec. 1969), the Tennessee Court of Appeals for the *Eastern* Section was ready to conclude that where unlawful conduct occurred at the strike scene, and where the local union president was physically present on the picket line with great frequency, (1) the president *must have been* aware of the unlawful conduct, and (2) that therefore "the only reasonable conclusion to be reached * * * is that the local knowingly tolerated and gave silent approval to the wrongful acts of its agents which occurred on the picket line," 73 LRRM 2256, 2259. The court cites Section 6 of Norris-LaGuardia, but in fact applies common law agency principles: "Under the law of agency a principal is responsible for tortious acts of the agent if the principal has a right to control the agent." 73 LRRM 2256, 2258.

The instant case carries forward the erosion of the heart of Norris-LaGuardia in that it bases liability for the Union upon unlawful conduct of union agents, and others, which was not shown upon "clear proof," to have been actually participated in, authorized by or ratified by the Union.

Following the numbering of the bases for the decision of the court of appeals adopted in the Statement of the Case at pages 8 through 10, *supra*:

Number 1 relates to the Union's agents' general control of the strike, and has no relation to any unlawful act.

Numbers 2, 3, 7, 13 and 15 recite acts of the Union's agents with no showing whatsoever of participation, authorization or ratification by the Union.

Numbers 4, 5 and 6 recite that the agents of the Union were in the picket line area when violence occurred, and/or knew of unlawful acts. These findings are not even "clear proof" as to the agents, and there is no showing whatsoever of participation, authorization or ratification by the Union.

Number 8 refers to acts of strikers, not agents, and there is no showing of participation, authorization or ratification by the Union.

Number 9 is the item reciting a "finding" made by the Employer's brief, but not supported by any evidence, or found by the district judge.

Thus, the only activities of the Union upon which liability could be based are those recited in numbers 10, 11, 12 and 14.

Number 14 is the Union newspaper article referring to the anger of the strikers, and boasting of the effectiveness of the strike. Read as a whole, its discussion of effectiveness clearly refers to the strike as a whole. (The complete text of the article, Exhibit 41, is reprinted in the Appendix hereto at page 40a.) There is no dispute but that the strike was lawful, and that this lawful withholding of labor by the employees was overwhelmingly effective.[11] And the

11. The district judge found, in Finding of Fact No. 25, that had there been no violence or unlawful activity, but only the lawful strike, the plant would only have produced at only 25 to 30 per cent of its normal capacity.

newspaper's discussion of anger is clearly a claim that the community and workers reacted with anger and solidarity to the pattern of unfair labor practices which the Sixth Circuit later found to have been the cause of the strike. Neither discussion can reasonably be viewed as the authorization or ratification of unlawful acts, much less as "clear proof" of such authorization or ratification.

Items 10, 11 and 12 deal with the facts that the Union:

(A) provided bail bonds and defense counsel for all strikers who were arrested, provided appeal bonds where appeals were taken, and paid fines where convictions occurred.

(B) continued to pay strike benefits to all strikers including those who pled guilty to criminal charges.

An ignorance of labor history is required to view as ratification the paying of strike benefits. As this Court stated in *Gibbs,*

> * * * [I]t would be inconsistent with the fabric of national labor policy to infer ratification from the mere fact that petitioner involved itself in the dispute after the violence had occurred, or from the fact that it carried on some normal union functions, such as provision of strike relief. A union would ordinarily undertake these tasks during the course of a lawful strike. (383 U.S. 715, 738-39)

Strike benefits have been paid in American labor history since the beginning of the nineteenth century.[12] Their payment, where money is available, is automatic and tradi-

12. See, for example, Brooks, *Toil and Trouble: A History of American Labor* (Dell 1964), at p. 19.

tional, and they are paid on the basis of need.[13] In this strike as in all others, TWUA paid strike benefits to all strikers in exactly the same way need exists: that is, without regard to virtue or vice. These payments were clearly not ratification of any acts—lawful or unlawful—precisely because they were paid to all strikers.

An ignorance of the presumption of innocence is required to view as ratification the Union's provision of bail bonds, of appeal bonds and of defense counsel.

That presumption of course does not apply to the payment of fines—an anachronism which unions have foolishly carried into the current era. Historically the labor movement has taken for granted that the power of the state would perform on call for employers in strike situations, and that as a result the railroading of strikers from arrest through conviction was inevitable.[14] In most cases today

13. See, for example, Barbash, *The Practice of Unionism* (Harper & Bros. 1956), at pp. 240-41.

14. See, for example, Bernstein, *The Lean Years* (Houghton Mifflin Co., 1960): "By the end of the twenties the gulf between labor and the law had become perilously wide * * * it would be difficult to conceive of a real advance toward "social justice" in the United States,' Donald Richberg observed in [1930], 'that * * * would not leave a vast wreckage of judge-made law in its pathway' "; "[I]t is a commentary on the state of labor relations in the late twenties to note the appallingly large number of arrests for felonies (murder, dynamiting, kidnaping, extortion, criminal libel, riot, inciting to riot, assault, malicious mischief, unlawful assembly, sedition, even treason) as well as for misdemeanors (disorderly conduct, obstructing traffic, disturbing the peace, trespass, loitering, assembling without a permit, even selling insurance without a license). In the New York garment strike of 1926, there were 7500 arrests in the first fifteen weeks; in the New York fur strike of that year, 884 arrests and 477 convictions; in the New Bedford textile strike of 1928, 2000 arrests; in the Elizabethton textile strike of 1929, 300 arrests in a single day; and so on and on," pp. 190, 204; and Chapter 4, "Labor v. the Law," *passim.*

this is not true. And yet Petitioner knows of no union which does not today continue the practice of paying fines —unthinkingly (at least until this case). Candor compels the admission that the payment of fines is the one element in this case which could be viewed as ratification. As the only such element, however, and in light of the historical reality, it can hardly be viewed as meeting the Norris-LaGuardia standard of "clear proof."

II

There is a conflict in the circuits.

Two weeks after the decision of the Sixth Circuit in the instant case the Fifth Circuit decided the case of *Dow Chemical Company* v. *International Union of Electrical Workers,* —— F.2d ——, 83 LRRM 2417 (5th Cir., 1973), involving both a breach of contract claim and also, by pendant jurisdiction, a violence case.

The facts in the *Dow* violence case very nearly track those in the instant case:

> [A]n International field representative instructed strikers to block ingress and egress to the plant. * * * [A] Local official advised sabotage of machinery. * * * [A]n Internationtal field representative advised stripping the clothes off female strikebreakers. * * * [A]n International field representative was present when the president of the Local threatened to hire out-of-town hoodlums * * * [O]fficials of both defendants [International and Local] participated in the mass picketing and shouting from the picket line. * * * 83 LRRM 2417, 2418.

The district court held:

> [T]here is no proof * * * that the defendant international authorized, ratified, or participated in the tortious acts enumerated. There is, of course, proof that individual members and officers of the defendants * * * committed acts of tort. * * * The testimony here is an aggregation of information about acts committed by certain persons at certain times. No nexus connects these acts to the union in the degree required by §6. * * * Evidence in the form of testimony as to the acts of union officials and members, and others, without more, is not indicative of union responsibility for the torts committed. In the absence of union authorization, participation, or ratification, such testimony does not tend to show liability upon the part of the union. 83 LRRM 2417, 2419.

The company appealed on exactly the issue in the instant case: "Dow Chemical * * * contends * * * that the International Union is nevertheless liable because three of its field representatives actively participated in the above-described conduct and that 'the participation of the three was in effect the participation of the International Union'." (83 LRRM 2417, 2419).

The Fifth Circuit sustained the trial court against this contention on the grounds that (1) there was no finding of unlawful activity by any International Union Executive Board member (true also in the instant case), and (2) that Norris-LaGuardia commands that the unlawful acts of union representatives who *are* found to have committed unlawful acts are not to be attributed to the union without clear proof of authorization, ratification or participation.

Similarly in *United States* v. *Kemble,* 198 F.2d 889 (3rd Cir., 1952), the Third Circuit refused to impute unlawful acts of the union's agent to the union—because that attribution is precisely what Norris-LaGuardia prohibits:

> In the Carpenters case, as in this case, an organization was indicted solely on the basis of acts of its agents. No effort was made to show any "participation" of the organization except insofar as acts of agents may have been authorized. Thus, demonstration that there was no sufficient proof of union "authorization" by the same token negatived union "participation." * * * There was a dissent in the Carpenters case. The dissenting Justices pointed out that, under the Court's construction of Section 6, responsibility of a union for acts of its officers or members would be limited for all practical purposes to cases where the wrongdoing in question or similar wrongdoing had been authorized or approved by vote at a union meeting or some equally clear manifestation of group will. The dissenting Justices seem to have believed that such doctrine as normally limits criminal responsibility for acts of agents, applied in conjunction with the normal requirement of proof of each essential element of a crime beyond reasonable doubt, would satisfy the provisions of the Norris-LaGuardia Act.
>
> But we must take the law as the Supreme Court finds it. For our purposes the dissent in the Carpenters case but emphasizes the stringency of the rule we are required to follow. This strict rule precludes a conviction here. 198 F.2d 889, 892-93.

Thus as to the Norris LaGuardia question, the Writ should be granted not only because the present decision conflicts with applicable decisions of this Court in eroding the conditions which Congress perceived to be necessary for labor union survival, but also because the circuits are in conflict regarding this question.

III

Question 2 raises an important question of federal law which has not been, but should be, settled by this Court.

Question 2—whether an employer which has by its unfair labor practices forced its employees to strike can collect damages from the union because of strike conduct which could not have occurred without the employer's unlawful conduct to compel the strike—is a question of first impression. In no previous case known to Petitioner has an employer sought damages in a strike which was caused by its own unfair labor practices.

It is as though a driver who had speeded through a red light at 60 miles an hour then came into civil court claiming that, since he had paid his fine for speeding, he was therefore entitled to damages from the driver of the other car in the wreck, because that other driver had been driving at 45 miles an hour, ten miles an hour greater than the speed limit.

In this case the Union was the driver in the 45-mile-an-hour car. It believes that it was not exceeding the speed limit. But even if it was at fault, it ought not be liable for damages which arise out of a wreck which was entirely caused, from the beginning, by the Employer's unfair labor practices.

The court of appeals has held that this question is answered by *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). But *Fansteel* does not at all deal with the ques-

tion at hand. *Fansteel* holds that employees who commit acts of violence are not entitled to reinstatement; that the employer's unfair labor practices do not "license" or "justify" violence so as to require reinstatement. To the extent that *Fansteel* can be analogized to the instant case, it would require that perpetrators of violence (including the Union, were it to be held a perpetrator of violence) could not recover damages from the Company: If we "contributed" to the wreck, we cannot recover from the red-light-runner. But that is very different from holding that we can be liable *to* him.

The court of appeals has characterized this argument as "a contention that the results of picket line violence should be treated as additional penalties to be imposed upon a company whose unfair labor practices have caused the strike." Not so. The light-runner has paid the only "fine" which Congress has provided; there is no further penalty. But again, this is not the same as saying that we can be liable to him.

The significance of this question for the development of American labor law arises from the unending pattern of employer law violations—the "dreary parade" which NLRB Chairman Miller points out continues to be the bulk of the NLRB's work. We believe that employers should not be rewarded by damage awards for pressing forward from the dreary parade to the third step of forcing employees to become unfair labor practice strikers—and violently embittered ones at that. We therefore believe that the question is an important question of federal law which has not been, but should be, settled by this Court.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PATRICIA E. EAMES
Attorney for Petitioner

Dated: New York, New York
August 3, 1973

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 72-2175

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KAYSER-ROTH CORPORATION,
Plaintiff-Appellee,

v.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed May 31, 1973.

Before: PECK and LIVELY, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

PECK, Circuit Judge. On January 19, 1969, the Kayser-Roth Company filed this action against the appellant Textile Workers Union of America in the Circuit Court of Rhea County, Tennessee, seeking recovery for damages arising from a strike that occurred at the Kayser-Roth hosiery plant in Dayton, Tennessee, in 1968. The company's complaint presented three theories for recovery: tortious interference with business, conspiracy to interfere with business, and violation of the federal secondary boycott laws.

On February 10, 1969, the appellant union caused the action to be removed to the Federal District Court for the Eastern District of Tennessee, and filed a counterclaim charging the company with an unlawful conspiracy to incite litigation, to induce perjury and to prevent the union from carrying out its lawful activities. The company denied the allegations of the counterclaim.

A trial was had to the District Court sitting without a jury, and the Court made extensive findings of fact and conclusions of law which are reported at 347 F. Supp. 801 (E.D. Tenn. 1972), and which need not be repeated here. The Court found that the company had sustained losses and damages of $1,158,632.46 as a direct result of violence and unlawful strike activity which the union either participated in, authorized or ratified. The Court found that the evidence was insufficient to establish an unlawful secondary boycott, and also found that the union failed to establish its counterclaims. The union has perfected this appeal from the judgment of the District Court.

The union's first contention is that the District Court lacked jurisdiction over the non-federal causes of action when it denied relief to the company upon its only federal claim, the violation of the secondary boycott provisions of the Taft-Hartley Act, 29 U.S.C. §158 (b)(4). At this point, the union contends, it became clear that the state claim was the real body of the case and that it should have been dismissed from the federal court.

The only findings necessary to support the District Court's exercise of pendant jurisdiction over the non-federal causes of action are that the federal claim has ap-

parent substance and that the state and federal claims derive from a common nucleus of operative fact. *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 725 (1966). Although the evidence did not warrant a finding for the company on the issue of secondary boycott, the evidence did indicate that there was substance to the company's allegations. For example, the company offered evidence tending to show that the union violently intimidated employees of neutral common carriers to the extent that they ceased to do business with the company, 347 F. Supp. at 805-06. And not only did the union not contest the jurisdiction of the District Court, *the case was removed from the State court upon the union's motion.* Given the expenditure of judicial time and energy on this case, and given the common nucleus of operative fact, we cannot say that the exercise of pendant jurisdiction by the District Court was an abuse of its discretion. *Gibbs, supra,* at 725-26; *Hurn* v. *Oursler,* 289 U.S. 238 (1933); *Ritchie* v. *Union Mine Workers,* 410 F.2d 827, 831-32 (6th Cir. 1969); *Connecticut General Life Ins. Co.* v. *Craton,* 405 F.2d 41, 48 (5th Cir. 1968); *Price* v. *United Mine Workers,* 336 F.2d 771, 776 (6th Cir. 1964); *Rumbaugh* v. *Winifrede Railroad Company,* 331 F.2d 530, 539 (4th Cir. 1964).

Secondly, the union contends that the evidence did not warrant the judgment because the company failed to show that the union was responsible for, participated in, authorized or ratified the acts complained of. Such a showing is necessary under the Norris LaGuardia Act, which provides:

> "No officer or member of any association or organization* participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual offi-

* *Sic.* The omission of the crucial statutory language appears in the original.

> cers, members or agents *except on clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts, after actual knowledge thereof.*" 29 U.S.C. §106. (Emphasis supplied.)

The statutory requirement of "clear proof" lies somewhere between the traditional burdens of reasonable doubt and preponderance of the evidence. *Gibbs, supra,* at 737. A review of the relevant evidence and of the reported findings of the District Court indicates that the company did meet this burden of proof on the issues of participation, authorization and ratification of numerous acts of violence by the strikers.

The involvement of the union in the violence and other unlawful and damage causing activities during the strike is demonstrated most clearly by the actions of Adolph Benet, the union's International Vice President, and Ted Benton and Walter Rainey, its International Representatives. During the course of the strike, these union officials personally participated in, observed, supervised and controlled the activities of the strikers. They leased property adjacent to the plant site for use as a strike headquarters; a mobile office was moved onto this property, and a shelter for the strikers was also provided. Other evidence indicated that Benton instructed the pickets to walk in such a manner as to make entrance to the plant difficult. Rainey instructed them that they should stop non-strikers from entering the plant by any means they could, including stripping off their clothes. Benton admitted that he was at the picket line from the beginning of the strike until the plant was closed supervising strike activities; Rainey spent about one-half of his time assisting Benton in the supervision of the strikers. During this period, numerous acts of extreme violence occurred which are fully recounted in the opinion of the Dis-

trict Court. In their capacity as strike supervisors for the union, Rainey and Benton observed groups of strikers while they blocked, stoned, and in some cases overturned vehicles bearing non-strikers attempting to enter or leave the plant.

Benton admitted that he was aware of the systematic daily implantation and re-implantation of nails and broken glass on company driveways, and when the company sought to provide bus service for non-striking workers, Benton personally directed the strikers to jam the buses to prevent boarding by non-strikers. The company eventually capitulated to the violence, and the plant was closed on June 24, 1968. Thereafter, the striking employees effectively prevented its reopening until September 16, 1968.

Nevertheless, the union maintains that it cannot be held responsible for the acts of violence committed by the strikers. This argument is not persuasive for several reasons. First of all, the union, as part of its program of conducting the strike, promised to protect the strikers against charges of criminal activities. The union provided bail bonds and defense counsel for all strikers who were arrested, all but one of whom pleaded guilty, and all of whom were convicted. Forty-three strikers, including Benton and Rainey, were charged with and were convicted of criminal contempt for failure to abide by the state court injunctions; all were represented by union counsel. The union paid over $167,000 in attorney's fees and over $155,000 was spent on strike benefits, appeal bonds and fines. Secondly, although the union asserts that it attempted to cool an explosive strike situation, it continued to pay strike benefits to strikers who pleaded guilty to criminal charges, and it provided free counsel and paid the fines of all strikers who were arrested and charged with criminal conduct or criminal contempt.

On the issue of ratification, which alone would be sufficient to justify an award under the Act, the company showed that when Benton returned from Atlanta after the two days of extreme violence, he congratulated some of the strikers for a job well done in closing down the plant. In its widely distributed magazine, the union boasted that "When they get angry enough to do things here in Tennessee they go all the way. The strike is 100% effective. The hosiery factory in Dayton seems to have been 'struck by a plague' * * *." Benton testified that these statements were not retracted by the union. The union wrote various union confederates letters in which it was stated that even though the company had attempted to continue plant operations, "we have the soldiers to win this battle," and that the union had "frustrated every move" the company made.

The union's contention that the finding of the District Court that the union representatives authorized, ratified and condoned the violent acts complained of was based only upon the testimony of three witnesses whose credibility was impeached is not well taken. First of all, the court found that this testimony was in fact corroborated by other evidence in the case, 347 F. Supp. at 809, and secondly, the evidence concerning credibility goes only to weight, not to admissibility. On the basis of the record before us, we will not disturb the findings of the District Court on this question.

> "What is required [in order to warrant a finding of ratification] is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force." *Gibbs, supra,* at 739.

The company offered clear proof that the union not only approved of the violence which occurred but that it, through several of its highest ranking officers, conducted, encouraged, authorized and participated in acts of violence which were violative of state law. The union's contention that the proof on these points is not clear proof is without merit.

The union next contends that the company should not be permitted to recover damages which it would not have incurred had it not violated the National Labor Relations Act. This contention is based upon the fact that the National Labor Relations Board has determined that the company violated the Act by refusing to bargain in good faith during contract negotiations prior to the strike. *Kayser-Roth Hosiery Co.*, 166 N.L.R.B. 372; *Kayser-Roth Hosiery Co.* v. *N.L.R.B.*, 430 F.2d 701 (6th Cir. 1970); *Kayser-Roth Hosiery Co.* v. *N.L.R.B.*, 447 F.2d 396 (6th Cir. 1971). The union's argument is in essence a contention that the results of picket line violence should be treated as additional penalties to be imposed upon a company whose unfair labor practices have caused a strike. This argument fails to consider that special appropriate remedial sanctions are available for unfair labor practices by a company, as have been invoked in this case. Furthermore, the Supreme Court has rejected the argument that violence by strikers should not be reimbursable if the strike was caused by the unfair labor practices of the company.

> "* * * [R]eprehensible as was the conduct of the respondent [company], there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but had no license to commit acts of violence or to seize their employer's plant. * * * To justify such conduct

> because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939).

In appealing from the amount of the judgment, the union does not deny that substantial damages were suffered; instead it contends that the company's proof of loss was not sufficiently documented and that the company failed to mitigate its losses. The District Court carefully distinguished between the losses sustained as a consequence of the lawful strike activity, which it ruled were not recoverable, and the losses which resulted directly and proximately from the violence and other unlawful strike activity, which it ruled were recoverable upon a showing of the "usual preponderance of the evidence rule generally applicable to civil cases." 347 F. Supp. at 814.

The company's evidence proved that the orders necessary to shipping the finished goods still in the plant when it was closed existed only in that plant and that access to the plant was being denied to all officers and employees of the company. Efforts were made with customers to obtain copies of these orders and new shipping instructions, but these efforts were of no avail. In addition, the union's assertion that the company failed to make additional attempts to enter the plant to regain control of the needed records and documents is not persuasive in light of the testimony concerning violence directed at virtually every employee of the company who attempted to cross the picket line. The company cannot be held to be liable for having failed to attempt to gain access to its plant under the exist-

ing circumstances. If anything, this cautious approach served to prevent additional violence and attendant additional damage.

Evidence indicated that binding orders were received by the plant for 386,774 dozen fishnet tights, most of which orders were not able to be shipped. The company established that other plants in the area could not have finished or shipped these goods, because the Dayton plant was the only company plant which was equipped to fabricate, dye, package and ship fishnet goods. Testimony also showed that the other Kayser-Roth plants were already engaged to capacity in the production of other different types of hosiery.

The union also appeals from the District Court's dismissal of its counterclaim, asserting that the company had conspired to subject the union to vexatious and improper suits and that the company had sought to procure perjured testimony through threats and bribery. The conspiracy claim stems from a reward offer which the company made at the height of the violent attacks against its non-striking employees, which is a legitimate method of obtaining aid in the apprehension of criminals and which cannot be considered as inciting litigation. The perjury action is based upon the assertion that the company's manager sought to induce employees to testify falsely. However, the evidence showed that these employees approached the manager armed with hidden recording devices, and attempted to solicit a proposal from him which might tend to incriminate him. They were not successful, and the District Court's dismissal of the union's counterclaims will not be disturbed.

We have considered the remaining contentions of the appellant and find them to be without merit. The judgment of the District Court is affirmed.

Findings of Fact and Conclusions of Law of the District Court for the Eastern District of Tennessee

UNITED STATES DISTRICT COURT

E. D. Tennessee, S. D.

July 27, 1972

Kayser-Roth Corporation

v.

Textile Workers Union of America, AFL-CIO

Civ. A. No. 5524

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Frank W. Wilson, Chief Judge.

This is an action involving a claim and counterclaim for damages arising out of a strike that occurred at the Kayser-Roth Corporation hosiery plant in Dayton, Tennessee, during the year 1968. The plaintiff, Kayser-Roth Corporation, seeks to recover for alleged unlawful interference with its business activities, alleged conspiracy to interfere with its business activities, and alleged violation of secondary boycott provisions of the Taft-Hartley Act [29 U.S.C. §158(b)] by the defendant, the Textile Workers Union of America. Defendant, by counterclaim, seeks to recover of the plaintiff for an alleged conspiracy to incite litigation and induce perjury and to unlawfully prevent the defendant from carrying on its activities as a labor union. Each party seeks both compensatory and punitive damages of the other party. The case was tried before the Court

sitting without a jury. The Court now enters the following findings of fact and conclusions of law upon the basis of the record established in the case.

Findings of Fact

(1) Kayser-Roth Corporation, hereinafter sometimes referred to as the "Company," is a corporation organized under the laws of New York and having its principal place of business elsewhere than in Tennessee. At all times relevant to this lawsuit it operated and maintained a plant in Dayton, Tennessee, where it manufactured various lines of men's and women's hosiery. During and prior to 1968, Kayser-Roth Corporation employed in excess of 500 employees at its Dayton, Tennessee plant and was an employer engaged in interstate commerce within the meaning of the National Labor Relations Act.

(2) The defendant, Textile Workers Union of America, AFL-CIO, hereinafter sometimes referred to as the "Union," is an unincorporated labor organization having its principal offices in New York, New York. At all times relevant to the matters here in issue the defendant Union was a labor organization within the meaning of the National Labor Relations Act and was the duly certified collective bargaining agent for all production employees at the plaintiff's Dayton, Tennessee plant.

(3) Beginning in 1964 the defendant Union undertook to organize the production and maintenance employees at the plaintiff's Dayton, Tennessee plant with the result that in September of 1967 the defendant was certified by the National Labor Relations Board as the bargaining agent for these employees. Bargaining between the Company and

the Union was not productive of an agreement, however, with the consequences that unfair labor practice charges were brought against the Company by the Union, charging, among other matters refusal to bargain. The charges were sustained by the NLRB and the action of the NLRB was affirmed upon appeal, with the result that the Company was ordered to cease and desist from such practices and to engage in good faith bargaining. See Kayser-Roth Hosiery Co., Inc. v. NLRB, 430 F.2d 701 (6th Cir. 1970). See also Kayser-Roth Hosiery Co., Inc. v. NLRB, 447 F.2d 396 (6th Cir. 1971).

(4) By May of 1968 no agreement had been reached. At that time the Union was being represented in the conduct of its affairs at the Dayton, Tennessee plant by Adolph Benet, a Vice President of the Union, and by Ted Benton, Walter Rainey, and Robert Beame, each of whom was an authorized and full time representative of the Union. Upon Sunday, May 5, 1968, the Union called a meeting of production and maintenance employees. Of the approximately 500 employees in the bargaining unit, estimates of the number of employees in attendance at the meeting varied between 200 and 350. At this meeting the Company's proposal for settlement was submitted and was rejected. The employees in attendance then voted unanimously to strike the following day.

On the morning of May 6, 1968, a large number of employees, variously estimated to be from 150 to 400, gathered in the vicinity of the plant entrances. There was a great deal of confusion, mass picketing, and blocking of entrances upon the first day of strike, but no violence. Someone padlocked two of the gates of the plant and these

locks had to be forcibly removed. The supervisory personnel, of whom there were approximately 20, and the office and clerical personnel, of whom there were approximately 30, reported for work that day, but only about 15 or 20 production or maintenance workers entered the plant to work that day. A strike headquarters was established in a trailer located a short distance from the plant entrances and the Union representatives hereinabove referred to undertook to supervise the strike from this headquarters. Three of the Union representatives, Benet, Benton and Rainey, were present at the strike scene throughout the day and undertook to organize the strikers by appointing picket captains and giving picketing instructions. These instructions included instructions by Benton that the pickets might walk in such a manner as to make entrance at the plant difficult, just so they continued walking. He also gave instructions that the Union would provide bail in the event strikers were arrested in connection with the strike. Walt Rainey told certain of the picket captains that if too many employees attempted to enter the plant to work, the pickets should stop them by any means they could, including stripping their clothes off, if necessary.

(5) Upon the second day of the strike mass picketing of the plant entrances continued with 30 or 40 pickets circulating in front of each gate. On this day some effort was made by the pickets and other strikers or strike sympathizers to prevent the entrance of vehicles carrying office personnel to work. There appears to have been no attempt by the Union representatives to limit the number of pickets in front of the plant entrances during the first two days of the strike and until an application was made for an injunc-

tion against mass picketing on the second day. The Union representatives then assured the state court to whom the application was made that a voluntary limitation of the number of pickets would be effected and that there would be no further interference with traffic coming to and going from the plant.

(6) Although by the third day of the strike there was some reduction in the number of pickets walking in front of the plant entrance, a large number of strikers continued to gather in the immediate vicinity. Supervisory and office personnel and a few production workers continued to enter the plant, but the pickets were sufficient in number and walked in such a manner as to render entrance to and exit from the plant slow and difficult. In the course of the day three company trucks were prohibited by pickets from removing goods from the plant. After some four hours they were permitted to leave the plant only after demonstrating to the pickets that their loads had been removed and that they were empty. Representatives of the Union were present at the picket line during at least a portion of the time that the pickets were thus blocking the plant gates. Whether they were themselves actually participating in the picket lines upon this occasion is disputed, but it is clear that they, as well as the local police who were also present, did nothing to require the pickets to cease blocking the plant entrances or to permit passage of the trucks.

(7) On the following day large groups of pickets continued to block or partially block the entrances to the plant whenever a vehicle attempted to enter or leave. The win-

dows upon one or more vehicles entering the plant were broken by rocks and other missiles thrown by unidentified persons in the vicinity of the plant gates. When these matters were brought to the attention of the Chancery Court on May 9, 1968, they resulted in that Court entering an injunction prohibiting the strikers from interfering with persons going to or from the plant.

(8) Over the next several days incidents of pickets blocking the entry or departure of company vehicles continued. In fact, it appears that from May 14 through May 21 several company trucks attempted to deliver materials into the plant, but upon each occasion the pickets walked in the entranceway in such a manner that the drivers could not enter or depart from the plant without running into or over the pickets. As a result, no company trucks were able to move merchandise into or out of the plant during that period. The next occasion upon which a company truck attempted to deliver materials to the plant was upon June 25, 1968. The driver of that vehicle was prevented from entering the plant by strikers and was warned not to return. While he was stopped at the plant entrance, one of the tires upon his truck was slashed and substantial damage was later done to the vehicle when he left it to obtain assistance. Throughout this period of time, one or more union representatives continued to check with the picket lines several times daily and were present at the strike headquarters supervising the strike. They appear to have done nothing to prevent pickets from blocking the movement of company vehicles, even when they were personally present at the picket line when this occurred.

(9) The nature of the plaintiff's business was such that during its normal operations it made daily shipments of its finished products to retail stores located throughout the United States. These shipments were largely made through Central Motor Express, Inc., a common carrier having terminal facilities in Chattanooga, Tennessee. In fact, it appears that Central was the only carrier available to the plaintiff which had Interstate Commerce Commission authority to take shipments from Dayton to Chattanooga and interline them with other truck lines having authority to reach the various destination points in the United States. The plaintiff also used Thurston Motor Lines to pick up shipments at its Dayton plant, but this motor carrier could take shipments only for eastern destinations, as it was required to route its shipments through Charlotte, North Carolina. The plaintiff also did a small amount of shipping through United Parcel Service, such shipments however being restricted to shipments not in excess of 40 pounds.

(10) On May 17, 1968, the plaintiff attempted to make certain shipments of finished goods through Central Motor Express. Several trailers were requested for loading. The terminal manager of Central delivered one such trailer for loading, but was blocked by pickets when he attempted to deliver the second trailer. After the Central tractor-trailer unit was held up some 30 minutes at the gate by the pickets, the plaintiff's plant manager called the Sheriff's Office for help in getting the truck into the plant. An officer was dispatched to the strike scene, but he arrested the Central driver for allegedly blocking traffic. As a result of the treatment of the Central driver upon this occasion, Central

filed an embargo notice with the Interstate Commerce Commission and refused to resume pickups or deliveries from the Dayton plant until after the reopening of that plant sometime in September of 1968. In the meanwhile, the Central trailer parked at the loading dock had its tires slashed by unknown persons. It remained abandoned at the loading dock until September of 1968.

(11) Some three days after the Central tractor-trailer unit had been blocked from entering the plant, and on May 20, 1968, a United Parcel Service tractor-trailer was dispatched to the plaintiff's plant to pick up a shipment of merchandise, but its entry into the plant was also blocked by the pickets and the plaintiff was unable to obtain any further service from that source until after September of 1968.

(12) On May 21, 1968, a supervisor for Thurston Motor Lines succeeded in delivering a trailer to the plaintiff's loading dock, but only after he had been held up for a time by the pickets. While so delayed by the pickets, Ted Benton, the Union representative who was present, sought to persuade the driver not to cross the picket line. After the driver eased his vehicle by the pickets, stones were thrown at him and at his assistant. A short while later, a local law officer appeared at the plant and arrested the driver for an alleged assault upon the pickets in making his entry. The driver was then ordered to take his truck and follow the officer to the local jail. A large number of strikers also followed him to the jail and there made a number of threats against him after he was released upon bail. One Rockholt,

the husband of a striker, then attempted to use his vehicle so as to block the tractor-trailer's passage upon the highway as it attempted to depart from Dayton. Rockholt was in turn arrested for this and his fine was paid by the Union. As a result of this treatment of its employees, Thurston Motor Lines refused to provide any further service to the plaintiff at Dayton until it could be assured of adequate police protection for its drivers and equipment.

(13) Because of the difficulties encountered in getting shipments out of its Dayton plant, and in an effort to effect a shipment of finished merchandise scheduled for delivery to customers in June, the plaintiff decided to attempt to move such finished merchandise from Dayton to a warehouse in Burlington, North Carolina, and there to complete the necessary procedures for shipping the merchandise to customers. To accomplish this the plaintiff sought and obtained assurances of additional state and local police protection to enable a common carrier to enter the Dayton plant and remove the merchandise. Upon the basis of this promised protection, Thurston Motor Lines agreed to return their drivers and equipment, with a result that between June 6 and June 20, some 40 to 50 trailer loads of finished merchandise were hastily loaded and moved out of the Dayton plant and delivered to the Burlington, North Carolina warehouse. Included in these shipments were approximately 121,000 dozen pairs of finished "fishnet" products, to which further reference will be hereinafter made. All of the detailed inventory records, shipping instructions, time tables, invoices and bills of lading which were required

to effect a final shipment of these goods to customers were retained in Dayton with the anticipation that they could be processed by the office personnel who normally performed that service.

(14) In the meanwhile, and from the commencement of the strike a small number of production and maintenance employees continued to report for work. Upon the first day of the strike only 15 or 20 such employees reported for work out of a total work force of 535 such employees. The number of workers reporting gradually increased so that by June 24 a total of 112 persons reported, including some 60 production workers and approximately 50 office and supervisory personnel.

(15) Throughout the period from the commencement of the strike upon May 6, 1968, until the closing of the plant upon June 25, 1968, quantities of bent nails and glass were strewn in the plant entranceways by unidentified persons. These caused numerous flat tires upon vehicles entering and leaving the plant. In an effort to remedy this situation the Company caused the entranceways to be washed down with a fire hose each morning, but a new supply of glass and nails was strewn each night.

During the latter part of May 1968 an increasing number of incidents of violence occurred both at or near the picket line and away from the strike scene. Upon various occasions rocks, eggs and other missiles were thrown by assembled strikers at non-striking employees' vehicles as they entered or left the plant, resulting in broken windows and other damage to the vehicles. The evidence reflects

that representatives of the defendant Union, including both Benton and Rainey, were present upon one or more occasions when missiles were thrown at non-striking employees' vehicles as they entered or left the plant. They claimed not to have seen such action. Upon other occasions, the homes and automobiles of non-striking employees were shot into and otherwise damaged. The Union provided attorneys to represent persons charged with such acts of violence against non-striking employees, both where such acts occurred at the picket line and where they occurred away from the picket line. After conviction of such persons the Union paid their fines upon several occasions. For example, upon May 23, 1968, two supervisory employees who had taken pictures of picket line activity were assaulted and beaten as they were leaving the Dayton Post Office after having mailed the film for processing. One was hospitalized for apparently serious head injuries received in the assault. The Union provided the two striking employees charged with the assault with bail and with an attorney and upon their conviction paid their fines. Upon another occasion, the home of a non-striking employee, Mrs. Gossett, was shot into during the night. The husband of a striking employee, who incidentally was also the brother of Mrs. Gossett, was charged with the offense. The Union provided him with an attorney and one of the Union representatives, Rainey, testified to an alibi for him. He was nevertheless convicted and the Union then paid his fine.

(16) In an effort to enable non-striking employees who wished to work to do so safely, the Company leased a passenger bus to be used in transporting such workers to and

from work. To counter this move, strikers would follow the bus to loading points and there fill the bus, preventing the loading of those workers who desired to work. The strikers would then insist upon riding to the plant where they would dismount and return to the picket lines. Although the Company later acquired a second bus for such use, the jamming tactic continued until the closing of the plant upon June 25. The evidence appears clear that a Union representative, Ted Benton, gave instructions to strikers to follow these tactics and that he later claimed credit for frustrating the Company's effort to transport non-striking workers.

(17) For a period of several weeks following the commencement of the strike, the plaintiff's Dayton plant continued to remain open with limited operations being carried on by the office and supervisory personnel, all of whom continued to report for work and by a small number of non-striking operating personnel who reported. The number of non-striking workers who reported appears to have gradually grown somewhat, so that by June 24 some 60 such workers reported, the largest number that had reported since the commencement of the strike. With these developments some strikers appear to have become somewhat discouraged over the prospects of the strike being successful. When one of them reported her concern to the Union representative, Ten Benton, he is reported to have told her not to quit picketing for "if they get to scabbing us too bad, we will shut the mill down."

(18) The clear weight of the evidence reflects that upon June 24, 1968 the following course of events occurred in

connection with the strike. During the course of the morning Ted Benton, who was the only Union representative present in Dayton on that date, gave instructions that the plant was to be shut down that day and for that purpose instructed that a number of striking employees be called and instructed to report to the picket line at the shift change that afternoon. He then left for Atlanta, leaving no Union representative present in Dayton. That afternoon a large number of strikers assembled in the vicinity of the plant entrances. As the shift ended at 4:30 p.m. and plant personnel attempted to depart from the plant, a hail of rock and missiles struck the departing vehicles. Windows and windshields were shattered upon almost every automobile. A number of windows were broken in the company bus and the assistant driver was injured. Just outside the plant entrance the automobile of one lady worker was set upon by strikers and overturned in the street. Rocks continued to be thrown at the occupants as they sought to climb out of the overturned automobile and one or more of the occupants was injured. The strikers participating in the overturning of the automobile were identified and pled guilty to criminal charges growing out of the incident. The Union paid their fines.

Upon this occasion some 25 or 30 vehicles attempting to leave the plant or parked at the plant were damaged, including a company station wagon which was turned upside down and totally demolished while parked inside the plant area. A number of windows were broken at the plant and other damage done by rocks thrown by strikers.

(19) The clear weight of the evidence likewise reflects that the following events occurred upon June 25, 1968. At opening time a large number of strikers had again assembled at the plant entrances. After the violence of the previous day, only 12 office employees and eight production workers reported for work. Again windows were broken upon several of the cars seeking to enter the plant. One of the office employees seeking to report for work, Susan Lewis Montgomery, had her automobile overturned at the plant entrance when she refused the strikers' demand that she not enter. A striker pled guilty to a criminal charge growing out of this incident and the Union paid his fine. Within a short while only one supervisor and 12 office girls remained at the plant. Because of the threats and violence that had occurred, they became fearful of remaining and sought to obtain assurances from the strikers that they could leave in safety. Upon this occasion a Union representative, Walt Rainey, was present at the picket line and appointed one of the pickets as spokesman in these negotiations. Arrangements were finally made to permit the office personnel to leave unharmed, but only after they agreed to individually come to the picket line and give assurance that they would not again cross the picket line. A further incident occurring upon June 25 was the action of the pickets in preventing the entry of a company truck seeking to deliver materials to the plant and the damaging of the truck on that date, to which reference was heretofore made in paragraph (8) of these findings.

(20) Following the events that occurred from June 24 and 25, the Company was unable to get anyone to return to

the plant. As a result the plant remained completely shut down from June 25 until September 16, 1968. The plant manager and another company official attempted to re-enter the plant at nighttime upon an occasion some two weeks after its closing to obtain needed records, but immediately a sizable number of strikers appeared at the plant entrances and the officials became fearful for their safety and departed.

Although following the incidents that occurred upon June 24 and 25 Union officials made public statements condemning the violence, they gave private assurances commending the strikers upon the closing of the plant. They gave no assurances to anyone, however, against the repetition of the violence that had closed the plant and took no steps to permit its reopening until a new and more restrictive injunction was issued in September of 1968. To the contrary, they claimed success for their strike efforts following the closing of the plant.

(21) Upon the closing of the plant a contempt action was filed by the Company against the Union and various strikers in the Chancery Court wherein an injunction had previously issued. The result of these proceedings was that a large number of strikers were found to have violated the injunction and to be in contempt. A further consequence of these proceedings was the issuance of an additional injunction limiting pickets to two per entrance and prohibiting all other strikers from assembling in the plant area. After these proceedings and following compliance with the new injunction, the plant reopened upon September 16, 1968. Thereafter a collective bargaining agreement was

eventually reached between the parties upon December 2, 1968.

(22) Although it is contended by the Union in its counterclaim that the Company engaged in a conspiracy to incite litigation and to induce perjury, all to the injury of the Union, this charge is not supported by the evidence. The defendant relies upon matters developed in the cross examination of the plaintiff's plant manager, Everett Roberson, wherein he had conversations after the strike with certain employees who had participated in the strike, seeking to develop evidence of Union participation in various acts of violence. It appears from this cross examination that the Union sent union members who had been provided with a concealed recording device to discuss with the plant manager the Company's offer of a reward for evidence relating to acts of violence. In the course of these conversations discussions were had regarding the nature of evidence that would be needed to connect the Union with the violence. The evidence does not support the contention that the plaintiff's manager sought to induce the employees to testify falsely or commit perjury. Rather it appears that the employees attempted to solicit such a proposal with the plant manager tending on occasion to accede to the solicitation. In view of the fact that the employees were sent by the Union to entrap the plant manager in this regard, he neither was successful nor could he have been successful even if such had been his purpose. The evidence at most goes to the credibility of the plant manager but does not establish a conspiracy to induce perjury to the defendant's injury.

In further support of its counterclaim, the defendant apparently relies upon the evidence as it relates to three union members who testified against the Union. These three witnesses, Judy Rockholt, Alene Wilkey, and Alma Michael, had each participated in the strike, two of them having served as picket captains and the other having served on the picket line. Having had a disagreement with the Union after the strike over certain personal expenses for which they sought to be reimbursed, they advised the Company of their willingness to testify against the Union. While the circumstances under which they agreed to testify against the Union would be relevant upon the issue of their credibility, their testimony on a number of matters relating to the conduct of the strike is corroborated by other credible evidence. To the extent that their testimony corresponds with the findings of fact as hereinbefore set forth, it is believed to be credible. In any event, these matters do not establish a conspiracy on the part of the plaintiff to induce perjury or incite claims against the defendant.

(23) The plaintiff's proof in regard to damages was limited to two categories of damage, one category being the losses the plaintiff contends it sustained upon a hosiery product referred to in the record as "fishnet" tights and the other category being certain non-routine expenses which the plaintiff contends it was caused to incur as a result of the strike. Under the first category of damage the plaintiff seeks to recover the sum of $2,614,115.86 as being the loss it contends it sustained upon fishnet merchandise which it held in inventory upon June 30, 1968. Under the second category of damages the plaintiff seeks to recover the sum of $101,-

708.78 which it contends was special or non-routine expenses incurred by it as a consequence of the strike.

(24) Turning first to the alleged losses upon fishnet merchandise, it is to be noted that the business conducted by the plaintiff at its Dayton plant consisted of the manufacture of various lines of men's and women's hosiery. Included within these products in 1967 and 1968 was a line of hosiery known as "textured tights" or, as generally referred to in the trade, "fishnet" tights. These tights were a single piece toe-to-waist garment. The textured material or "fishnet" was purchased by the plaintiff in tubular form and then manufactured into finished tights. A portion of the plaintiff's work force at its Dayton plant was devoted to the manufacture of these tights. In addition to the fishnet tights manufactured at the Dayton plant, the plaintiff also contracted for the manufacture of fishnet tights at other Kayser-Roth plants located in Spring City, Tennessee and Tellico, Tennessee. However, all finishing, dyeing, packaging and shipping of fishnet products was conducted exclusively at the Dayton plant. It appears that the Dayton plant was the only plant in the Kayser-Roth system equipped to perform these activities and was the only plant in the system from which customers were supplied with fishnet tights.

(25) At the inception of the strike in May of 1968 the plaintiff had in its inventory at the Dayton plant 311,947 dozen fishnet tights which were fully fabricated and for which it had firm orders. Finishing, dyeing and packaging had been completed upon 121,222 dozen of these garments,

with such operations remaining to be performed upon the other 190,725 dozen fabricated but unfinished garments, the latter being referred to in the trade as "greige" goods. Of the 121,222 dozen finished garments, all that remained to be done was to process the paper work required to accomplish shipment and to repack and ship them in accordance with the detailed shipping instructions from individual stores and various chain store systems who were the customers of the plaintiff. Necessary to accomplish these operations were the orders, inventories, control records, shipping timetables, shipping instructions, invoices and bills of lading, all of which were located at the Dayton plant. Some 25 or 30 office employees were in charge of these records and performed the paper work necessary to the shipping of the finished items. The evidence reflects that these records and these operations could not be duplicated elsewhere than at the Dayton plant. Accordingly, with the closing of the Dayton plant upon June 25, 1968, no further shipment of the finished fishnet garments could be made until after the plaintiff reopened its plant on September 16, 1968. The evidence further reflects that but for the closing of the plaintiff's plant upon June 25, 1968, these operations would have been completed in time to meet delivery schedules upon existing orders and in time for the September back-to-school market in so far as concerns the 121,222 dozen finished fishnet tights.

With regard to the remaining 190,725 dozen fishnet garments which were in inventory upon June 30, 1968, but remained unfinished, it was estimated by the plaintiff's plant manager that these garments could have been finished at a cost of $290,110.71. It was further contended that this

could have been done with the labor force on hand on June 24, 1968, and in time for delivery before the September back-to-school market but for the closing of the plant upon June 25, 1968 (see Exhibit No. 53). It is apparent, however, that these projections are based upon a number of assumptions, including the following: (1) that but for the closing of the plant upon June 25, the plaintiff would have continued to have not less than 61 supervisory or production workers available for completing the necessary finishing and packaging operations upon the greige goods inventory; (2) that among these would be the requisite skills for performing the various finishing operations; (3) that all such available employees would have been assigned to the finishing of the fishnet greige goods to the exclusion of all other hosiery lines; (4) that efficient scheduling and utilization of the available employees would enable such finishing operations to be completed within ten weeks; and (5) that such a 10-week finishing schedule would have permitted delivery during June, July and August of all unfinished fishnet greige goods prior to cancellation of orders for late delivery. While the initial assumption, namely that a minimum of 61 supervisory and production workers would have remained available throughout the summer had the strike remained lawful and non-violent, appears to be a reasonable assumption in the light of the record, each of the remaining assumptions is subject to question under the record in this case, for in effect they each appear to be based upon an assumption not only of 100% utilization of available personnel in finishing fishnet greige goods, but also a 100% efficiency in the use of skills and time. While exactness is always difficult in making projections, a 25% to 30% effi-

ciency rate would appear to be a more reasonable anticipation under strike conditions.

The Court is accordingly of the opinion that the evidence fails to preponderate in favor of the plaintiff's contention that but for the violence and other unlawful strike activities it would have finished in time for summer delivery all of its fishnet inventory held in greige goods at the time of the strike (190,725 dozen). Rather, it appears that the evidence would preponderate only in favor of a finding that the plaintiff could have finished and made summer delivery of not more than 30% of such inventory (57,200 dozen) had not violence and other unlawful strike activity closed the plant.

Accordingly, the Court finds that the portion of the plaintiff's loss upon its fishnet inventory attributable to violence and other unlawful strike activity chargeable to the defendant in the course of an otherwise lawful strike would be limited to the loss sustained by the plaintiff upon its inventory of 121,222 dozen finished fishnet tights, plus 30% (57,200 dozen) of its fishnet inventory held in greige goods.

(26) The evidence reflects that the fishnet tights were a fad, or high fashion item, much in demand in 1967 and during the first half of 1968, but that the fad had largely run its course by the fall of 1968 and the demand accordingly fell rapidly after that date. At the time of the strike in May of 1968, as well as at the closing of the plaintiff's plant upon June 25, 1968, the plaintiff held firm orders from responsible customers sufficient to sell all of its then existing inventory of fishnet tights, both of those finished and those in the greige, provided that it could have finished and

shipped such merchandise in June, July or August in time for the September back-to-school market. At the closing of its plant upon June 25, 1968, the plaintiff's average selling price of fishnet tights upon its then existing orders was in the sum of $12.40 per dozen (See Exhibit No. 52). Upon the plaintiff being unable to make delivery upon these orders, either from its Dayton plant or from other sources, in June, July and August, customers turned elsewhere for their supply, leaving the plaintiff without orders for its existing inventory upon the reopening of the Dayton plant in September of 1968. During the remaining months of 1968 the plaintiff sold 65,194 dozen of its fishnet inventory for $726,662.19, or at an average price of $11.14 per dozen (See Exhibit No. 56). During the year 1969 it sold an additional 146,366 dozen for $371,007.01, or at an average price of $2.54 per dozen. In January of 1970 it sold 144,867 dozen for $125,650.25, or at an average price of 87¢ per dozen. Between January and March of 1970 it sold 45,452 dozen at $79,624.13, or at an average selling price of $1.75 per dozen. Its remaining inventory of 35,152 dozen was sold between April of 1970 and June of 1971 for $45,931.02, or at an average price of $1.30 per dozen. The average price of all fishnet sales made after the reopening of the plant in September of 1968 was $3.09 per dozen (See Exhibit No. 56). On the basis of an average selling price of $12.40 before the closing of the plant in June of 1968, additional manufacturing costs of $290,110.71 and an average selling price of $3.09 per dozen, the plaintiff contends that it sustained a loss of $2,614,115.86 upon its inventory of 311,947 dozen fishnet tights (See Exhibit No. 54).

In making this contention the plaintiff seeks to apply an average order price of $12.40 per dozen upon orders in existence prior to the closing of the plant and an average selling price of $3.09 per dozen received by it after the reopening of the plant in the total liquidation of its fishnet inventory. While the former figure would appear to be established by the evidence (See Exhibit No. 52), the latter figure would not. In addition to the inventory held at the time of the closing of the plant, it includes the sales of fishnet tights completed after the reopening of the plant (See Exhibit No. 56). Rather, it would appear that the sales price received after reopening of the plant should be the actual sales price received by the plaintiff in the various sales of its fishnet inventory, all as set forth in Paragraph (26) above with such actual sales prices to be applied to the fishnet inventory on a first completed-first sold basis. Thus the loss sustained by the plaintiff upon its inventory of 121,222 dozen finished fishnet tights would be as follows:

121,222 dozen at $12.40 per dozen (average sales price for cancelled orders per Exhibit No. 52) =		$1,503,152.80
Less amount received in sales after reopening of plant:		
(a) 65,194 dozen at $11.14 per dozen (Per Exhibit No. 56) =	$726,662.19	
(b) 56,028 dozen (121,222 less 65,194) at $2.54 per dozen (Per Exhibit No. 56) =	$142,311.12	$ 868,973.31
Loss on 121,222 dozen finished fishnet tights =		$ 634,179.49

The loss sustained by the plaintiff upon its inventory of 190,725 dozen fishnet greige goods inventory would be as follows:

57,200 dozen (190,725 x 30%) at $12.40 per dozen (Average sales price for cancelled orders per Exhibit No. 52) =	$709,280.00
Less cost of finishing ($290,110.71 per Exhibit No. 54 x 30%) =	87,033.00
	$622,247.00
Less amount received in sales after reopening of plant: 57,200 dozen at $2.54 per dozen (Sales price per dozen per Exhibit No. 56 Jan.-Dec. 1969) =	$145,288.00
Loss on 190,725 dozen greige goods fishnet tights =	$476,959.00

The total loss on fishnet tights, finished and unfinished, due to the unlawful strike activity for which the defendant would be responsible would accordingly be as follows:

Loss on finished fishnet tights:	$634,179.49
Loss on unfinished fishnet tights:	$476,959.00
TOTAL	$1,111,138.49

(27) As noted in Paragraph (23) of these findings, the plaintiff seeks to recover a second category of damages in the sum of $101,708.78 as special or non-routine expenses alleged to have been incurred by it as a consequence of the strike. As itemized in the plaintiff's Exhibit No. 59, these expenses are as follows:

Freight Expense	$ 30,287.51
Guard Service Expense	54,624.27
Bus Expense	2,509.00
Cost of reworking goods due to customer cancellation of orders	9,264.00
Supplies and Repairs	1,524.00
Building Rent-Coble Tobacco Warehouse	3,500.00
TOTAL	$101,708.78

The freight expense in the sum of $30,287.51 was incurred in the movement of the plaintiff's finished inventory in an effort to effect delivery and would reasonably appear to be a consequence of the illegal strike activity for which the defendant has been found to be responsible.

As regards the claim for guard expense (Exhibit No. 59, page 3) it is apparent that the major portion of these expenses were incurred as a consequence of lawful strike activity, and not as a consequence of the illegal activity for which the Union would be responsible. The plaintiff incurred in excess of $8,000.00 in guard expense during each of the months of May and October 1968, the former sum being incurred before the closing of the plant and the latter sum being incurred after the plant had reopened under lawful strike conditions. The average monthly guard expense for these two months was in the sum of $8,364.00. It is accordingly reasonable to assume that but for the illegal strike activity resulting in the closing of the plant the plaintiff would nevertheless have incurred guard expense in the average sum of $8,364.00 per month. In line with this, the plaintiff would be entitled to recover only the amount in excess of this monthly average, or the sum of $4,440.46, as guard expense incurred by reason of illegal strike activity.

It does not sufficiently appear that the bus expenses ($2,509.00) and the supply and repair expenses ($1,524.00) were the consequence of illegal strike activity for which the defendant would be responsible.

The cost of reworking goods in the sum of $9,264.00 due to the cancellation of orders, as well as the cost of rental of a warehouse in the sum of $3,500.00, would each appear

to be a consequence of illegal strike activity and hence recoverable.

The Court accordingly finds that the plaintiff was caused to incur special expenses in the sum of $47,493.97, being the total of the above allowed items, by reason of the illegal strike activity for which the defendant would be responsible.

Conclusions of Law

(1) This Court would have jurisdiction of the parties and, pursuant to 29 U.S.C. §186, would have jurisdiction of the plaintiff's cause of action alleging violation by the defendant of the secondary boycott provisions of the Taft-Hartley Act [29 U.S.C. §158(b)(4)]. The federal claims having apparent substance, the Court would likewise have pendent jurisdiction over the non-federal causes of action, being both the plaintiff's claim for unlawful interference with business activities and for alleged conspiracy to interfere with its business activities and the defendant's counterclaim for alleged conspiracy to incite litigation and induce perjury. United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1956).

(2) The original action herein being an action for damages against a labor union growing out of a labor dispute, the standard of proof required to establish liability would be as set forth in Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106) wherein it is provided:

> "No officer or member of any association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United

> States for the unlawful acts of individual officers, members or agents except on clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

"Clear proof," as used in the foregoing statute, was defined in the case of United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), as follows:

> "Although the statute does not define 'clear proof,' its history and rationale suggests that Congress meant at least to signify a meaning like that commonly accorded such similar phrases as 'clear, unequivocal and convincing proof.' Under this standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with 'more than a bare preponderance of the evidence to prevail.' "

As stated by the Court in a recent case arising from this District, Ramsey v. United Mine Workers, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971): "* * * §6 requires clear and convincing evidence only as to the Union's authorization, participation in, or ratification of acts allegedly performed on its behalf." As to all other issues the usual preponderance of the evidence rule generally applicable to civil cases would apply.

(3) The evidence fails to sustain the plaintiff's secondary boycott allegations. The secondary boycott ban of the Taft-Hartley Act [29 U.S.C. §158(b)(4)] does not prohibit conduct on the picket line at the site of the primary strike

even when such conduct involves the employees of third parties. As stated by the Court in the case of National Labor Relations Board v. International Rice Milling Co., Inc., et al, 341 U.S. 665, 71 S.Ct. 961, 95 L.Ed. 1277 (1951):

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of §8(b) (4) and they do not here."

Moreover, the fact that the picket line activity was accompanied by violence does not change the primary nature of such activity. As stated by the Court in United Steel Workers of America v. NLRB, 376 U.S. 492, 84 S.Ct. 899, 11 L.Ed.2d 863 (1964):

> "In the instant case the violence on the picket line is not material. The complaint was not based upon that violence as such. To reach it the complaint more properly would have relied upon §8(b)(1)A or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained of conduct into conflict with §8(b). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt."

Although there was proof in the record of hostile strike activity on one or two occasions directed at common carriers and their employees at places remote from the primary strike scene, the evidence in this regard is insufficient both in the nature of such activities and in the lack of a showing of union responsibility for such activity to constitute a cause of action for secondary boycott.

(4) The evidence likewise fails to establish a conspiracy between local law enforcement officials and the Union to prevent non-striking employees and others from coming to or leaving the plant. Although it does appear that local law enforcement officials may upon occasions have stood idly by while acts of violence and other unlawful acts were being committed in their presence or may even have acted in a manner to further the restriction of movement in and out of the plant, the Court is of the opinion that the evidence fails to establish any conspiracy between the Union and local law enforcement officials in this regard.

(5) The evidence also fails to establish that the plaintiff participated in a conspiracy to induce perjury or incite litigation against the defendant or otherwise unlawfully prevent the defendant from carrying on its activities as a labor organization, all as alleged in the defendant's counterclaim.

(6) The clear and convincing weight of the evidence establishes that the Union authorized, ratified and approved, and was accordingly responsible for, numerous acts of force and violence and other conduct which unlawfully prevented the plaintiff from moving materials and merchandise into and out of the plant at Dayton, Tennessee, unlawfully prevented office and supervisory personnel, as well as non-striking employees who desired to work, from entering the plant and unlawfully closed the plant upon June 25, 1968, and prevented its reopening until September 16, 1968, all as heretofore set forth in the findings of fact. While the losses sustained as a consequence of lawful strike activity are not recoverable, it is well settled in Tennessee that damages inflicted as a consequence of violence, mass picketing, intim-

idation and coercion in the course of a strike are recoverable. McDaniel v. Textile Workers Union, 36 Tenn.App. 236, 254 S.W.2d 1 (1952); International UAW v. American Metal Products Co., 56 Tenn.App. 526, 408 S.W.2d 682 (1964); UMW v. Meadowcreek Coal Co., 263 F.2d 52 (6th Cir., 1959); UMW v. Osborn Mining Co., 279 F.2d 716 (6th Cir., 1960); Allen v. UMW, 319 F.2d 594 (6th Cir., 1963); White Oak Coal Co., Inc. v. UMW, 318 F.2d 591 (6th Cir., 1963); Lewis v. Pennington, 257 F.Supp. 815 (E.D.Tenn., 1966); Love & Amos Coal Co. v. UMW, 53 Tenn.App. 37, 378 S.W.2d 430, U.S. cert. den. 376 U.S. 971, 84 S.Ct. 1137, 12 L.Ed.2d 85.

(7) The plaintiff sustained losses and damages in the total sum of $1,158,632.46 as a direct and proximate result of violence and other unlawful strike activity which the clear weight of the evidence establishes that the defendant Union either authorized, ratified or participated in. These losses and damages consist of losses in the sum of $1,111,-138.97 upon fishnet tights and special expenses in the sum of $47,493.97. The plaintiff is entitled to recover a judgment against the defendant accordingly.

(8) In view of the fact that the plaintiff has itself heretofore been found guilty of unfair labor practices precipitating the strike [See Kayser-Roth Hosiery Company, Inc. v. NLRB, 447 F.2d 396 (6 Cir. 1971)], in view of the compensatory damages awarded, and in view of all of the circumstances shown in the evidence, the Court is of the opinion that no award of punitive damages should be made herein.

A judgment will enter in accordance with these findings of fact and conclusions of law.

Text of Exhibit 41, "A Struggle for Justice," 29 Textile Labor 3 (1968)

By KATHY DONAHUE

DAYTON, Tenn.

TUCKED AWAY in the Great Valley between the Smokies and Cumberland mountain ranges in the rugged eastern Tennessee countryside are 6,000 residents of this historic hamlet.

Seldom does anything ruffle their feathers. But when a Tennessean does get ruffled, he stays that way a long while. Right now some 500 of the town's residents, their families and friends are truly angry. Kayser-Roth, the well-heeled giant textile company, won't give them a minimal union contract.

Nearly five years ago Dayton citizens employed at the Kayser-Roth hosiery factory here decided that they needed a union. On Nov. 18, 1964 an election was held by the National Labor Relations Board. Although a majority of the employees voted for TWUA, the union was not certified as bargaining agent until Sept. 11, 1967 because of challenged ballots resulting from the discharge of 31 employees by the company during the election campaign.

At the NLRB hearing the company was found guilty of committing unfair labor practices and of discharging a number of their employees because of active membership in the union.

It was not until Oct. 2, 1967 that Kayser-Roth finally agreed to recognize TWUA and the first union-management meeting was held. Since then more than a dozen meetings have been held without reaching an agreement. When the

time came for Kayser-Roth to sit down and work out a contract, TWUA members stared in disbelief and amazement as the company refused time and again to bargain in good faith.

The company refused to agree to settle grievances through impartial arbitration and instead proposed that TWUA strike if a grievance could not be settled. The company has consistently refused to grant seniority rights and basic union security. TWUA even called in a government conciliator and that, too, failed when Kayser-Roth refused to cooperate. Last May 6, TWUA members let Kayser-Roth know how they felt about his lip-service-only type of bargaining. They went out on strike.

When they get angry enough to do things here in Tennessee they go all the way. The strike is 100% effective. The hosiery factory in Dayton seems to have been "struck by a plague," as Scott Hoyman, TWUA southern regional director, describes it. The factory is completely idle and so effective is the strike that the picketline, now entering its 16th week, is a casual affair run from law chairs bordering the grassy knolls around the factory. And why not run a picketline from a comfortable chair? No one is going to bother going into THAT plant while its citizens are seeking justice from a giant conglomerate.

What is Kayser-Roth doing to meet their employees' modest desires? Nothing. They are using the same standard delaying tactics employed by other anti-union textile firms in the South. To meet NLRB requirements the company goes through the motions of meeting with the TWUA bargaining committee, but sends officials without any authority to the bargaining table. At a July 11 session the

Exhibit 41

TWUA bargaining team agreed to grant all management rights clauses *as the company had written them* if the company would grant arbitration. The company refused.

The strike is not an economic struggle for higher wages, although employees make little more than the federal minimum of $1.60 at the hosiery plant. It is a strike in protest against the company's refusal to bargain in good faith. The objective is union security and arbitration.

Kayser-Roth, which had sales of $390 million and pocketed about $12 million in profit after taxes in 1967, is using the favorite ploy of the banker's mentality against the strikers: raw financial pressure. They hope to dilly-dally around so long that the strikers will tire of the picketing.

But Kayser-Roth can dilly-dally all it likes, because support for the strikers continues to mount steadily. In addition to financial aid from the TWUA Defense Fund, locals in neighboring towns and cities have offered support and other international unions are sending both funds and cheers to the strikers.

On July 17 the New York State AFL-CIO adopted a resolution backing the nationwide boycott of Kayser-Roth products and called for the "full support of all segments of the labor movement" in the boycott. The New York City Central Labor Council followed suit with a resolution and other state and city groups were jumping on the bandwagon and considering supportive action at upcoming meetings.

Meanwhile, the story of the Kayser-Roth situation in Dayton is being told across the nation in the daily and labor press. The *RWDSU Record,* sent to 200,000 retail clerks in department stores in the U.S., asked its readers to help the boycott. On the national level a giant undertaking is

Exhibit 41

underway to spread the Kayser-Roth story to key government officials.

Why is this particular strike 100% effective? "This company has got to realize that we are fighting for our children and their future," says one TWUA member. "For generations we've seen this town run by one clique that forces our younger generation to leave their homes to find decent working conditions elsewhere," says another striker. "We want to give our children the opportunities here in Dayton that they deserve."

Today when Dayton citizens discuss the Kayser-Roth situation it is with bewilderment. . . . especially those citizens who know that Kayser-Roth officials like to present a liberal-social justice face in the North where they endorse arbitration and, ironically enough, receive human rights awards while denying justice to their southern employees.

"We read all about his great firm and how liberal it is up North," says one striker. "We've got a huge investment in this strike . . . not only for our children, but for their children, too. For them we can afford to stay strong and fight because the stake is so great."

Yet another striker states: "We don't have any problems because of the strike here. In fact, I've heard dozens of people say they are better off with it. None of us are hurting, but we hope Kayser-Roth feels the dent."

As the TWUA members in Dayton see the situation, it is not their battle alone. They carry on the fight not only on behalf of their children but for some 500,000 ill-paid, ill-treated, unorganized textile workers in towns and hamlets just like Dayton throughout the South.

SUPREME COURT, U. S.
FILED
SEP 7 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-261

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, *Petitioner*

vs.

KAYSER-ROTH CORPORATION, *Respondent*

On Petition for Writ of Certiorari

BRIEF FOR KAYSER-ROTH CORPORATION, IN OPPOSITION

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On Petition for Writ of Certiorari

BRIEF FOR KAYSER-ROTH CORPORATION, IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This action began on January 19, 1969, with the Declaration of Kayser-Roth Corporation in the Circuit Court of Rhea County, Tennessee, alleging a claim against the Textile Workers Union of America, AFL-CIO, for damages suffered from the Union's unlawful activities during a 1968 strike at the Company's hosiery plant in Dayton, Tennessee. The Union removed the action to the United States District Court for the Eastern District of Tennessee.

Trial before the District Court was commenced in May and concluded in September of 1971. The Court entered its findings of fact and conclusions of law in July of 1972. It was found that the Company sustained

damages of $1,158,632.46 as a direct and proximate result of the violence and other unlawful strike activity which, by the clear weight of the evidence, the Union either participated in, authorized or ratified. The Court ruled that the plaintiff was entitled to recover this amount as compensatory damages. Punitive damages were denied.

The judgment of the District Court was appealed to the United States Court of Appeals for the Sixth Circuit. On May 31, 1973, the Court of Appeals affirmed the decision below. The Union's Petition for a Writ of Certiorari was received by the Company on August 8, 1973.

FACTS PERTINENT TO THE DECISION BELOW

The Beginning Of The Strike

The Dayton Plant of the Kayser-Roth Corporation employed approximately 535 employees for the manufacturing of socks, pantyhose and "fishnet" tights. The Plant was managed by Everett Roberson.

The Textile Workers Union of America, AFL-CIO, was certified as the bargaining agent for the production and maintenance employees of the Plant in September 1967. Following certification, there was extensive bargaining between the Union and the Company until May 5, 1968, without an agreement being reached. Acting for the Union in these negotiations were Adolph Benet, International Vice President of the Union, and Ted Benton, Walt Rainey and Robert Beame, International Representatives of the Union (72a).[1]

[1]Page references followed by "a" are to the "Joint Appendix" filed in the Court of Appeals. Undesignated page references are to the "Official Transcript of Proceedings."

On May 5, these union officials presided over a meeting attended by 200 to 350 employees. During the meeting, a vote was taken with a result unanimously in favor of a strike. Benet thereupon instructed all of those present to gather in front of the Plant on the following morning at 6:00 a.m. (75a).

The next morning, between 150 and 400 persons gathered at the plant entrances. The plant entrances were blocked and there was pushing and shoving between strikers and people attempting to go to work. Union Vice President Benet and Representatives Benton and Rainey were present. After Benet determined that no one else was attempting to go into the Plant, he called a meeting of the strikers at the Union's headquarters which had been established 200 feet north of the plant premises. At this location, the Union rented a house trailer and equipped it with telephones for use during the strike (45a, 75a, 134a, 1445).

At the meeting, Benet, Benton and Rainey appointed picket captains and instructed the pickets. Benton directed that the pickets should walk in such a manner as to make entrance to the Plant difficult. He stated "we don't have to get far enough apart to let anyone in or anything" and Rainey told the pickets "stop them any way you can, take their clothes off or anything." Benton further informed the strikers that the Union would provide bail in the event any of them were arrested (46a, 74a, 75a, 81a).

Mass picketing resumed on the second day of the strike. The strikers parked their automobiles bumper to bumper along the street in front of the Plant. Thirty or 40 pickets circled in each gate. As a group of female office employees, riding in the company station wagon,

attempted to enter the plant premises, the automobile was surrounded by 30 or 40 strikers who rocked it from side to side, bouncing its wheels off the ground (137a).

On the afternoon of May 7, the Company petitioned the Chancery Court of Rhea County for an injunction against the mass picketing. Union representatives Benet and Benton appeared at the Court hearing and assured the Chancellor that there would be no further interference with traffic coming and going at the Plant. Upon receiving these assurances, the Chancellor refused to grant an injunction (403a).

However, on the next morning, Benet and Benton violated their own assurances to the Court. They returned to the picket line along with a large number of strikers and marched in circles in the entrance ways, preventing company trucks from entering and leaving the premises. Benton and Rainey were filmed actively participating in these incidents. The trucks, which had come from North Carolina to deliver materials to the Plant, were blocked and impeded by the strikers during that entire day and the following day. Benet, Benton and Rainey were on the scene, directing the strikers' activities (139a-153a).

As a consequence, the Chancellor entered an injunction prohibiting further interference with persons seeking access to the Plant and prohibiting groups of strikers from assembling within 40 feet of the company gates (47a).

Interference With Company Trucks And Common Carriers

After issuance of the injunction, the pickets continued to block vehicles. On each occasion that drivers of company trucks attempted to deliver materials, the pickets

walked in the entrance ways in such a manner that the drivers could not enter or depart without running into them. The Company was unable to move merchandise into or out of the Plant. During this time, Ted Benton was on the scene every day, supervising the strike. He was either actually on the picket line or at union headquarters, just north of the Plant. Whenever he had to leave, Walt Rainey was called in to replace him (46a, 101a, 156a, 176a, 255a, 470a). The District Court found that the union representatives, even when present at the picket line, did nothing to prevent the activities directed at company vehicles (48).

Due to the nature of the Company's business, it was necessary for daily shipments to be made by common carrier to retail stores located throughout the United States. Central Motor Express, Inc., was the only common carrier which had Interstate Commerce Commission authority to take the shipments to Chattanooga to connect with other trucking lines having authority to reach the various destination points over the country. The Company also shipped by Thurston Motor Lines, Inc., but Thurston could only deliver to eastern destinations through Charlotte, North Carolina. United Parcel Service also took limited quantity shipments (128a).

On May 17, Central Motor Express sent a tractor and two trailers to the Plant to pick up shipments. When Ted Cline, Central's Terminal Manager in Chattanooga, attempted to take the second trailer onto the plant premises, he was surrounded by strikers and blocked for 30 minutes. Plant Manager Roberson called the Sheriff's Office for help, but when the officer arrived, he arrested Cline, allegedly for blocking traffic, and took him to jail. Cline stated that he had never in his life been subjected to treatment such as he received from the strikers. Cen-

tral filed embargo notices with the Interstate Commerce Commission and refused to continue pickups or deliveries from the Dayton Plant. No Central truck got into or out of the plant property for several months thereafter. The first trailer, which had been left at the Kayser-Roth dock, remained there, with slashed tires, until September (162a, 383a).

Three days after the Central incident, a United Parcel Service truck was blocked by the pickets. The Company was unable to obtain any further service from that source until after September 1968 (162a).

On May 21, Thurston's Chattanooga Terminal Manager, John Banks, and a supervisor, David Pardue, attempted to drive through the plant gates. They were delayed by pickets getting in front of the truck in the entrance way. Ted Benton and Robert Beame were filmed participating in this incident. After Pardue eased the vehicle past the pickets, rocks were thrown by the strikers, barely missing Banks and hitting the trailer. Within minutes, Banks and Pardue were arrested on blank warrants, sworn out by the pickets, and charged with assault. Banks was ordered to take his truck and follow the arresting officer to the local jail. A large number of strikers followed him to the jail, where they made threats against him. Banks testified that the pickets, both at the Plant and at the jail, told him "you will never get back to Chattanooga. We will get you when you get out of here." He estimated there were over 100 people gathered at the jail, harassing and threatening him (170a, 243a).

The Thurston truck was followed out of Dayton onto the highway, where the husband of one striker used his automobile to block its passage. He was arrested by a

highway patrol officer and his subsequent fine was paid by the Union. As a result of these incidents, Thurston Motor Lines refused to provide any further service to the Plant until it could be assured of adequate police protection (177a, 247a).

The above-related instances typify the activities which shut off the normal daily pickup of shipments. To coordinate the efforts to block these motor carriers, a system of "walkie-talkie" radios was utilized between the picket line and union headquarters. On at least one occasion when a truck approached the Plant, Ted Benton appeared on the scene and replaced the two pickets walking in the gate with other strikers, explaining that the replacements knew how to walk in a manner so that the trucks could not get in (114a, 142a, 207a).

Unlawful Interference With Non-Striking Employees

From the commencement of the strike, a number of production and maintenance employees, along with the office and management employees, continued to report for work. The number of persons reporting for work gradually increased during the strike so that by June 24 a total of 112 employees reported, including some 60 production workers and approximately 50 office and supervisory personnel (329a, 516a).

Throughout the strike, attempts were made to prevent these employees from exercising their right to continue working. Large quantities of bent nails and glass were strewn in the plant entrance ways on a daily basis. These were washed away by the Company with the use of a fire hose, but a new supply always appeared by the next day. There were numerous flat tires, including an occasion when all four tires on the company station wagon were

flattened at once, each tire having been punctured by approximately 20 nails (158a, 220a).

During the latter part of May, an increasing number of incidents of violence occurred both at or near the picket line and away from the strike scene. Nearly every car which attempted to drive onto the plant property was stopped by the pickets, who crisscrossed and circled slowly in the entrance ways. As these cars waited to enter the Plant, they were damaged by rocks, eggs and pieces of concrete thrown from crowds of strikers gathered near the gates. Windows and windshields were shattered. Ted Benton was shown on a film in such a crowd participating with the strikers as rocks hit the automobiles. Both he and Rainey admitted being in crowds at the picket line, but denied seeing any violent acts (154a, 165a, 180a, 440a).

The film of the early strike scenes was taken by plant engineer Wilbert E. Pascal. On the 23rd of May, Pascal and another plant engineer took this film for processing and went to the post office for the company mail. As they emerged from the post office, they were assaulted by strikers Donavan Wilkey and Johnny Louallen. Pascal was taken to the hospital unconscious from a blow on the head. Louallen and Wilkey were arrested for this assault and the Union provided their bail bonds. At their trial, the Union furnished an attorney and, upon conviction, their fines were paid by the Union (183a).

Also, on the morning of May 23, in Benton's presence, pickets blocked the entry of non-striker Robbie Riggs' automobile. This car had already been paint-bombed and smashed with objects thrown by the strikers. As it sat motionless waiting for the pickets to move, one of the pickets, Frances Miller, brushed against it and fell to the

ground, shouting that the car had hit her. Benton went over and helped her up. Thereafter, at union headquarters, Peggy Wright, the local Union secretary-treasurer, in Benton's presence, painted Miller's leg with black shoe polish and rubbed it in to create a false appearance of a large bruise. At Benton's direction, striker Judy Rockholt then photographed Miller's leg. Miller then filed criminal charges against Riggs. The Union also charged Riggs with violence and sought to have her held in contempt of the Chancery Court's injunction. At the hearing before the Chancellor on the contempt charge, the Union presented Frances Miller as a witness against Riggs and introduced into evidence the photograph which purported to show a large bruise on Miller's leg. On the basis of this evidence, the Chancellor adjudged Riggs in contempt of court for injuring Miller. It was not until many months later that witnesses emerged to reveal that the photograph had been faked by the Union (79a, 204a, 275a, 391a).

The violent acts leveled against the non-strikers were not confined to the picket line. Employees' automobiles, homes and businesses were shot into with shotguns and rifles. The violent activity resulted in a large number of the strikers being convicted of criminal contempt of the Chancery Court injunction. Strikers, their relatives and sympathizers also pleaded guilty to, or were found guilty of, numerous criminal acts against the non-strikers. The Union provided attorneys for these people, financially sponsored their defenses and paid the resulting fines (237a, 435a, 504a).

In early October 1968, at the close of one of the bargaining sessions with the Union, Plant Manager Roberson was surrounded by a group of strikers at the Dayton City Hall. He was attacked by Willard Nixon, who was

on the Union's payroll during the strike as a "temporary organizer." Roberson's nose was broken in the attack. The Union supplied an attorney for Nixon and he pleaded guilty to criminal charges stemming from this incident (203a, 436a).

Interference With The Company's Effort To Provide Transportation For Its Working Employees

To prevent further damage to automobiles and to provide safe transportation for employees who were attempting to continue working, the Company leased a bus. A scheduled route was established and non-strikers were notified that they could ride the bus to and from work. Thereupon, Ted Benton directed the strikers to get on the bus and load it down. Large numbers of strikers followed the bus in their cars to the various stopping points and filled the bus to capacity. They then refused to get off until transported back to the Plant. A number of fights and altercations between strikers and non-strikers resulted (208a).

Although the Company later acquired a second bus to provide additional transportation, the jamming tactic continued until the Company discontinued the bus service. Benton then wrote letters to other unions proclaiming the success of his efforts to frustrate the use of buses by the Company. He stated that "we frustrated their every move" (387a, 458a).

The Violent Shutdown Of The Plant

In spite of the incidents related above, the Plant remained open for business. All office personnel and the management staff reported for work daily. The number of production employees who reported for work in-

creased, reaching a peak on June 24, when 60 workers reported, along with 52 office and managerial employees. Shortly before that date, picket captain Alma Mickel advised Benton that she was going to quit the strike because a lot of people were going in to work and the strike was ineffective. Benton stated to her that "if they get to scabbing us too bad, we'll shut the mill down" (53a, 122a, 516a).

On the morning of June 24, 1968, union representative Benton gave instructions that the Plant was to be shut down that day. He told those strikers at strike headquarters to telephone all striking employees and direct them to report to the picket line at shift-change time that afternoon. In his presence, they began making the telephone calls, stating "Ted Benton wanted them to be there at shift change, that the plant was going to be closed." Benton also told Judy Rockholt that he could not be there when it happened but that Walt Rainey was coming in later. Shortly thereafter, Benton left for Atlanta, leaving no official union representative present in Dayton (53a, 83a, 105a).

That afternoon as the shift ended, a crowd of 150 to 200 strikers assembled across the street from the Plant. The Court found that a hail of rocks and missiles struck the departing vehicles. Windows and windshields of almost every automobile were shattered. The company bus was severely damaged (187a).

Simultaneously with the attack upon these cars and their occupants, strikers went up the street alongside the plant breaking out the windows and louvers of the building (197a). The District Court found that some 25 or 30 vehicles were damaged, including the company station wagon which was turned upside down and totally demolished while parked inside the plant area.

Just outside the plant entrance, an automobile occupied by female employees was surrounded by strikers and overturned in the street. Rocks were thrown at the occupants of the overturned car, as they sought to climb out of it. The ladies in the car managed to kick out the shattered glass windshield and crawl out of the car through the opening. They emerged battered and bloody. The rocks continued to rain upon them and they took shelter behind the overturned car. Plant Manager Roberson saw them and started to their aid. But the rocks were then directed at him and he was forced to retreat (189a, 302a).

Roberson identified a number of the strikers who had turned the car over and thrown the rocks. Among those he named were Gene Smith, Bucky Wilkey and Johnny Louallen, each of whom had previously committed violent criminal acts against the non-strikers (Exhibits 20, 21, 33; 183a, 200a). As in the earlier cases, they pleaded guilty to the resulting criminal charges and the Union paid their fines (190a, 202a).

On the following morning, June 25, very few employees attempted to enter the Plant. Susan Montgomery, one of the office employees, attempted to drive into the parking lot but a crowd of strikers surrounded her car. When she told them she would not go home, they turned the car over with her in it. Bucky Wilkey, one of the strikers involved in the previous violence, pleaded guilty to a criminal charge growing out of this incident and the Union paid his fine (199a, 370a).

Only 12 of the office employees and 8 of the production workers got into the Plant for work that morning. Several of the women had their car windows broken as they drove into the parking lot. They were told by the pickets

that if they went into the Plant they would never get out. At this same time, a company truck seeking to deliver materials to the Plant was surrounded by strikers and its tires were slashed (257a, 311a).

While the crowd was occupied blocking the truck, some of the people who had come to work left the Plant. When the attention of the crowd was turned back to those in the Plant, only one supervisor and the 12 female office employees remained. They became fearful of remaining in the Plant and sought to obtain assurances from the strikers that they could leave in safety (267a).

Several of the women began to cry. They made calls for assistance to the police and city officials. Police officers present would not escort the women out. The supervisor, Bobby Payne, went out and talked to the strikers three times but could get no assurance that the women would be allowed to leave unharmed. Union representative Walt Rainey was present at the picket line and appointed one of the strikers as spokesman for the crowd. Arrangements were finally made to permit the office personnel to leave unharmed, but only after they agreed to come out individually to face the crowd and give assurances that they would not again cross the picket line. Aylene Wilkey testified that Rainey had appointed her spokesman for the group and that he had remained there the whole time (108a, 119a, 267a-271a).

Following these events, the Company was unable to get anyone to return to the Plant. Even though the doors of the Plant remained open, none of the employees or management personnel thereafter entered. The Plant remained completely shut down from June 25 until September 16, 1968. On one occasion, the Plant Manager and another company official attempted to re-enter the

Plant at night to obtain records needed by the Company in order to ship goods, but when a sizeable number of strikers immediately appeared at the plant entrance, the officials became fearful for their safety and departed. The strikers then followed them away from the Plant until these officials drove to and entered the police station (333a).

Union Actions Following The Shutdown Of The Plant

Following the above-related incidents, the union officials privately commended the strikers for closing the Plant down. Funeral wreaths appeared on the plant entrances. Benet and Benton returned to Dayton from Atlanta on the night of June 25. They called a meeting with the strikers at union headquarters on the afternoon of the 26th. Both of them addressed the strikers, saying that they were disappointed to learn of the violence and that such illegal acts must be avoided in the future. After this meeting, Judy Rockholt approached Benton and told him she did not understand, to which he replied that he had to tell them that, but "it was a good job done on shutting down the mill" (85a).

A bargaining session was held between company and union representatives on June 28. At the outset of this meeting, company representative Carlysle Isley protested the violence. Benet replied that he knew nothing about any violence. He declared that he had come to the meeting to negotiate a contract and would not discuss the violence or plant shutdown (417a). Furthermore, he accused the Company of unlawful unilateral action in shutting the Plant down of its own volition (417a).

This position was consistently maintained by the Union thereafter. It did not make any statement to the

public or to the Company denouncing or disapproving the violence. Neither Vice President Benet nor the other union officials involved would give any assurance to the Company that a repetition of the violence would not occur (55a, 417a, 442a).

During the weeks that followed the plant shutdown, Benton stayed in Dayton, supervising the strike. On July 5 and on various dates thereafter, he sent letters to representatives of other unions who had supported the strike. In these letters, Benton reported that "we have been able to frustrate every move" of the Company in attempting to operate the Plant, and announced "we have the soldiers to win this battle" (387a). A cover story in the next published issue of the Union's national magazine proclaimed that"When they get angry enough to do things here in Tennessee they go all the way, the strike is 100% effective. The hosiery factory in Dayton seems to have been 'struck by a plague' . . ." (470a).

After becoming convinced that the Plant would remain shut down, the Union chartered buses and took the strikers, including many of those who had engaged in the violence, on trips to Chattanooga, Knoxville, Burlington, N. C., Washington, D. C., and New York City. On these trips, the strikers picketed the stores of Kayser-Roth's customers. In New York, they met the Union's President, William Pollack, who congratulated them for the fine job they had done and renewed the Union's pledge to continue its full support of them. Full financial support was continued by the Union in every respect (431a, 471a).

During the period of the shutdown, an investigative agent of the National Labor Relations Board went to Dayton to investigate the violence and to take affidavits

from the strikers. Striker Aylene Wilkey testified that the union officials helped make up a false story for the strikers to put into the affidavits to the effect that a bunch of strangers had committed all the violence. She also testified that the affidavit she gave to the Board implicated Walt Rainey in the incident on June 25. When Rainey later read the affidavit, he made her change it (118a).

Judy Rockholt testified that she was told by the union representatives that she should never mention them in court (98a). When hearings were held before the Chancery Court upon contempt citations and the Company's motion for an expanded injunction, witness after witness for the Union testified that they had been present in crowds at the Plant and had watched as cars were damaged. But none of them "could remember" who had thrown the rocks, or who had helped turn the cars over. The Chancellor rejected their testimony and found 45 of them, including union representatives Benton, Rainey and Beame, in contempt of the injunction. An expanded injunction was put into effect and access to the Plant was restored to the Company on September 16, 1968. The strike continued thereafter until December 2, 1968, when a collective bargaining agreement was reached between the parties (E49; 202a).[1]

The Company's Claim With Respect To Damages

At the trial, the Company made no claim that it should be awarded general damages for such items as loss of customers or loss of profits on goods not produced or sold. It also made no claim to recover losses sustained

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[1]Numerals preceded by "E" refer to pages of the "Exhibits to Appendix" filed in the Court of Appeals.

on account of its inability, during the strike, to produce, sell or ship socks and pantyhose, the production of which utilized the services of the majority of its employees. The Company limited its claim to those damages growing out of the Union's unlawful interference with the Company's efforts to ship finished, or substantially finished, textured "fishnet" tights, which had already been sold and were awaiting delivery to customers. Additionally, damages were sought for certain extraordinary expenses incurred by the Company as a direct result of the violent and unlawful activities of the Union (344a). The District Court's determination of the amount of these losses was affirmed by the Court of Appeals and is not challenged here.

ARGUMENT

A. The Findings And Conclusions Reached Below That Clear and Convincing Evidence Proved The Union Authorized, Approved And Ratified The Unlawful Strike Violence Are Fully Supported By The Record

The District Court and the Court of Appeals carefully observed the requirement that union responsibility for strike violence can be established only by clear and convincing evidence. The evidence received meticulous scrutiny in the light of the "clear proof" standard expressed in the Norris-LaGuardia Act, 29 U.S.C. §106. This Court's explanation of that standard in *United Mine Workers v. Gibbs*, 383 U. S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), was expressly considered and followed.

It was the conclusion of both courts below that by the "clear and convincing weight of the evidence" the Union "had authorized, ratified and approved, and was accord-

ingly, responsible for, numerous acts of force and violence . . ." It was also found by clear and convincing evidence that this violence prevented the movement of materials and merchandise, prevented non-striking employees from working, shut the Plant down completely on June 25, and prevented its reopening until September 16, 1968.

In light of the abundant evidence in the record reflecting the Union's connection with unlawful and violent activity, much of which was not contradicted, it is an understatement to say that the Union's responsibility for all this was established merely by clear and convincing evidence. In truth, the evidence established beyond peradventure of doubt that the violent efforts to close the Plant were carried out under the direction, supervision, and control of high-ranking union officials. On numerous occasions, these same union officials personally participated in the violence.

The conduct and supervision of the strike was assigned to Adolph Benet, the Union's International Vice President, and Ted Benton and Walter Rainey, its International Representatives.

Early in May 1968, these union officials leased property adjacent to the plant site for use as the Union's strike headquarters. A furnished mobile office was moved onto this property and equipped with a telephone and two-way "walkie-talkie" radios. Strikers were required to report to the Union's strike headquarters each day. There they were instructed and dispatched to strike duties by Benet, Benton and Rainey (75a, 142a, 390a, 422a, 1256, 1318).

At the very outset, Benton instructed the pickets to make entrance to the Plant difficult. Rainey amplified

Benton's directive with instructions that pickets should stop non-strikers by any means they could, including stripping off their clothes. Benton assured the pickets that the Union would provide bail bond for strikers who might be arrested. From that time on, until the Plant was violently closed on June 25, Benton was, as he admitted, at the picket line practically all the time, "supervising" strike activities. Rainey spent approximately one-half of his time at or near the picket line, assisting Benton (81a, 390a, 436a, 462a).

At first, a crowd of over 150 strikers, along with Rainey and Benton, massively choked entryways to the Plant. While Benton and Rainey were on the picket line, a company station wagon loaded with office employees was rocked back and forth by strikers in an attempt to turn it over. Also, individual non-strikers were assaulted (133a, 141a, 153a, 182a).

Upon being summoned into State Court to show cause why an injunction should not be issued, Benet and Benton made a false assurance to the Court that they would attempt to stop such activities. When, upon the basis of that, the Court refused to issue an injunction, Benet and Benton proceeded promptly back to the picket line and participated with the pickets in a resumption of precisely the same sort of misconduct (46a, 137a-153a, 402a).

Benet and Benton personally supervised the halting of the Company's interplant transportation. In an incident that extended over a period of hours, these Union officials were on the scene, supervising and directing strikers in blocking the exit of two company trucks, permitting them to leave only after the trucks were unloaded.

Benton personally saw to it that the transportation of company products by Thurston Motor Lines was interrupted. When that Company's equipment approached to enter the plant property, Benton placed two experienced pickets in the gateway to block it while he talked to the drivers. Then when these Thurston employees refused to be scared off, they were showered with stones and falsely arrested on fake warrants with Benton standing by and observing (170a, 243a). Each time that a commercial vehicle approached the Plant, mass pickets were dispatched by radio from the Union's headquarters to block the gates (77a, 114a, 142a).

Benton and Rainey were found to have been observed repeatedly in groups of strikers while vehicles bearing non-strikers were blocked and stoned (165a, 179a, 440a, 476a, Exhibits 14-18). Moreover, Benton admitted the systematic daily implantation of Company driveways with nails and broken glass (159a, 220a). And, when the Company sought to overcome the effects of this violence by providing bus service for non-striking employees, Benton admittedly directed the strikers in jamming the buses and preventing the passage of non-strikers. Benton's directive was carried out with devastating effect (100a, 159a, 220a).

Upon being confronted by a contempt citation from the State Court, Benton resorted to other treachery. Under his direction and supervision, a striker feigned injury by the automobile of a non-striker at the picket line (205a-206a). Then he personally supervised the faking of a photograph, which the Union lated introduced into evidence in the contempt proceedings, thereby tricking the Court into finding that non-striker guilty of criminal contempt (79a, 204a, 275a, 391a).

In spite of all this, the Plant continued to operate. Benton, therefore, announced that if the "scabbing" operation continued, he would shut the Plant down. In preparation for this, large caches of stones were transported to and stored upon property directly across the street from the plant gates (83a, 122a, 189a, 194a).

On June 25, Benton and Benet were scheduled to appear before the Labor Board in Atlanta. Obviously, Benton regarded this as a ready-made alibi. Before leaving on the morning of the 24th, Benton gave instructions that all strikers be summoned to shut the Plant down at shift-change time that afternoon. As a result, strikers gathered in massive numbers, destroyed practically every breakable thing in sight and severely injured several female employees (187a, 197a, 302a, 455a).

On the following morning, Rainey appeared on the scene. While he was in the Union's headquarters across the street, strikers turned over a vehicle occupied by an office employee who was attempting to enter the Plant. Rainey then appeared at the Plant with a large group of riotous strikers who imprisoned and intimidated the few workers who had dared enter that day. Under Rainey's supervision, an individual apology for crossing the picket line and a promise not to return was exacted from each employee before he or she was permitted to leave (107a, 119a, 266a, 307a).

When Benton returned from Atlanta the next day, he congratulated Rockholt for a job well done in closing the Plant down. Victory for the Union was complete. What followed at the picket line was aptly described by the Union as a "picnic-like" atmosphere. A funeral wreath was placed on the Plant and pickets lazed along the street. At the Union's expense, strikers were taken

in buses on excursions to various points, including the Union's home office in New York City where they were congratulated by Union President, William Pollack (335a, 471a).

In its widely distributed magazine, the Union boasted that "when they get angry enough to do things here in Tennessee they go all the way. The strike is 100% effective. The hosiery factory in Dayton seems to have been 'struck by a plague'. . . ." Benton supplemented this with letters to various union confederates wherein he bragged that, even though the Company had attempted in various ways to continue plant operations, "we have the soldiers to win this battle" and that they had "frustrated every move" the Company had made (387a, 470a).

With no apparent concern over the guilt of strikers, the Union stood solidly behind its promise to protect them against charges of criminal activities. Bail bonds and defense counsel were provided immediately for all who were arrested. All who were charged, except Dan Harvey, pleaded guilty. Harvey was convicted. Along with Benton and Rainey, 43 strikers were convicted of criminal contempt. Union counsel represented all of them, even though many did not deny their guilt. The Union paid all fines which were levied. In all, the Union paid out $167,808.11 in attorneys' fees. Another $155,869.46 was spent on strike benefits, appeal bonds, and fines (81a, 436a, 504a, Exhibits 20, 21, 26, 32, 36; 183a, 200a—203a).

As the evidence shows, in one way or another the Union's hand reached into each and every act of violence committed against the Company and its non-striking employees. It is hard to conceive of a case where union

responsibility could be proven by evidence more clear and convincing.

In collective bargaining sessions which followed the closing of the Plant, Benton and Benet insisted that they had no knowledge whatever of any strike violence. They flatly refused to discuss with company officials the matters of restoring order to the picket line or granting the Company access to its Plant (227a, 418a).

The Union argues that if it is held responsible in this case Section 6 of the Norris-LaGuardia Act will be eroded. It contends that a union should not be held responsible for violence unless it formally authorizes its officials in advance to engage in specific acts of strike violence.

The Norris-LaGuardia Act does not impose any such requirement.

> "What is required is proof, either that the Union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force."
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> *United Mine Workers v. Gibbs*, 383 U.S. 715, 739, 16 L. Ed. 2d 218, 235, 86 S. Ct. 1130 (1966)

Accord: *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 409, 91 L. Ed. 973, 986, 67 S. Ct. 775 (1947); *Riverside Coal Co. v. United Mine Workers*, 410 F. 2d 267 (6th Cir. 1969); *Dean Coal Company v. United Mine Workers*, 421 F. 2d 1380 (6th Cir. 1970).

B. The Decision Of The Court Of Appeals In This Case Is Not In Conflict With Decisions Rendered In Other Federal Courts Of Appeals

The Union asserts that this case is in conflict with a recent case decided in the Fifth Circuit concerning the application of §6 of the Norris-LaGuardia Act. But an examination of this section of the Act, as applied by this Court, and the Courts of Appeals reveals no conflict in its application.

In the *Gibbs* case, quoted above, this Court carefully explained the basic framework of §6 and how it is to be applied by the Courts of Appeals. As was stated there, the "driving force" behind §6 was "the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." 383 U.S. at 737, 16 L. Ed. 2d at 234, 86 S. Ct. 1130. In the present case, the evidence clearly reveals that the union officials not only controlled the strikers, they guided them down the path toward physically violent acts endangering the lives of many innocent persons. The Union is in no position to say that these events were beyond its control. On the contrary, the increasing acts of violence, which, over a period of weeks, developed into a wholesale riot, were perpetrated with the aid and direct participation of top ranking union leaders.

Gibbs also states that a union will be held accountable if it "builds upon" the fear which has been engendered by acts of violence, or "draws upon" the force of such violence. 383 U.S. at 735, 739, 16 L. Ed. 2d at 233, 235, 86 S. Ct. 1130. Certainly the Union did both in the instant case. After the bloodshed and destruction of June 24 and 25, the Union published an account of its successful "plague" upon the Plant. This publication was

mailed to its membership nationwide along with an appeal for further support of the strike. Other unions were appealed to for support. These appeals bragged that the Union's "soldiers" had "frustrated" every move of the Company.

The violent shutdown put the Plant out of business for months, causing a substantial amount of added pressure upon the Company in the bargaining negotiations. Nevertheless, the Union flatly refused to take any action to nullify or remove the force and impact of the violence. There was no evidence that at any time the Union "did what it could"[1] to restrain or curtail the violence. It refused to discuss the restoration of control of the plant to the Company. Instead of doing what it could to curtail the effects of the violence, the evidence clearly proved that the Union was willing "to see its ends accomplished through violence."[2]

All of these facts, which the District Court found were clearly and convincingly established, lead to the inescapable conclusion that under *Gibbs*, and under §6 of the Act, the Union should be held accountable for the destruction and damage that occurred.

The Union argues that *Dow Chemical Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, ____F. 2d ____, 83 LRRM 2417 (5th Cir. 1973) is in conflict with the instant case and other Sixth Circuit cases over the proof required by §6. But a comparison of the cases fails to reveal any conflict.

Dow and the instant case have material factual differences which explain the results of each. In *Dow*, the

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[1]*United Mine Workers v. Gibbs*, 383 U.S. 715, 739, 16 L. Ed. 2d 218, 235, 86 S. Ct. 1130 (1966).

[2]383 U.S. at 742, 16 L. Ed. 2d at 237, 86 S. Ct. 1130.

District Court found insufficient involvement by high-level officials of an international union to meet the clear proof standard of §6. Although there was disputed testimony[1] of involvement by international representatives in that case, the District Court did not accept this testimony as fact. The Fifth Circuit merely applied its "clearly erroneous" rule in finding that there was not sufficient basis for overturning the trial court's conclusion in *Dow*.

With regard to §6 of the Act, the opinion rendered by the Fifth Circuit in *Dow* cites the Sixth Circuit's decision in *United Mine Workers v. Meadow Creek Coal Company*, 263 F. 2d 52 (6th Cir. 1959). This reliance by the *Dow* panel upon *Meadow Creek* indicates that there is no conflict between the views of the two circuits. The uniformity of views upon the application of §6 is also demonstrated by the fact that the District Court in the instant case also cited and relied upon the *Meadow Creek* decision.

Moreover, the factual distinctions between *Dow* and the instant case are clearly apparent. A reading of the *Dow* opinion shows that there was no evidence of ratification by high union officials and there were no findings of fact comparable to the rock throwing and bloodshed involved in the instant case, which the court found was directed and approved by the Union's International Representatives. Moreover, there was no finding in that case that the Union's President and Vice President hailed

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[1]In its Petition to this Court, the Union tries to create an impression of factual similarity between *Dow* and this case by purporting to quote, on page 21, the "facts" found in the *Dow* case. However, what is actually quoted there is merely "disputed testimony" in the District Court, and not "facts" found by the Court. Actually, the Court rejected the disputed testimony upon balance with other testimony in the case.

the strikers' activities as achieving a great success for the Union. Here they not only spread their congratulations all over the nation, they took advantage of every benefit they could possibly derive from the force and effects of the violence.

There was no finding in *Dow* that the Union officials involved there promised the strikers indemnity from any financial consequences that might result from court prosecutions for illegal acts and subsequently fulfilled such promise by providing counsel, and fine payments, for one and all. In the present case such findings were made. The evidence revealed not only that the Union paid the fines in this instant case, but also that a massive effort was made by top union officials and representatives to fabricate evidence in order to hide the true facts from both the courts and the Labor Board.

In sum, a comparison of *Dow* and the present case fails to present a contrast in the standards applied to a given set of facts. On the contrary, the courts have applied the same standards, but to different facts.

In this case, the trial court carefully observed the witnesses and critically analyzed their testimony. It found the testimony of witnesses presented by the plaintiff to be clear and convincing. The Union's representatives either admitted or failed to deny much of their involvement in unlawful activity and the court found the evidence to be clear and certain that they were intimately involved in all of it. Many of the films and documentary exhibits showed the Union's involvement in a fashion which could not be contradicted.

The findings of the trial court were affirmed by the Court of Appeals, and thus stand before this Court as unanimous, concurrent fact findings by the courts below. This being the case, the Union's insistence that this

Court review the evidence and absolve it of all wrongdoing should be denied. *Berenyi v. Immigration Service*, 385 U.S. 630, 635, 17 L. Ed. 2d 656, 661, 87 S. Ct. 666 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 93 L. Ed. 672, 677, 69 S. Ct. 535 (1949).

C. The Decision Below Is Consistent With The Established Law As Enunciated By This Court And Presents No Novel Issues To Be Decided

This Court has consistently recognized the rights of the States to deal with violence and related activity appearing in labor disputes. A variety of remedial measures grounded in state law have been sustained against contentions that the field of labor-management relations was entirely pre-empted by the passage of federal labor relations statutes. *United Mine Workers vs. Gibbs*, 383 U.S. 715, 729, 16 L. Ed. 2d 218, 230, 86 S. Ct. 1130 (1966) collects these cases.

It is also a well-established principle, not only of labor-management relations but of general application, that persons who desire to redress alleged grievances do so through established legal channels. Resort to acts of violence and destruction, such as those inflicted upon the Company, its non-striking employees, and persons seeking to do business with the Company, is intolerable in any civilized society.

Nevertheless, defying all logic and reason, the Union requests this Court to save it harmless from incurring any adverse consequences from engaging in such lawless acts. It asks this Court to do so because of an imagined "southern textile conspiracy", about which nothing appears in the record in this case.

Thus, not only is the Union's argument grounded upon baseless assertions never involved in the litigation below, it also flies in the face of one of the most fundamental values of society—that of maintaining peace, order and safety for all citizens.

The Union argues that the strike was "caused" by the way the Company acted in bargaining. But regardless of what caused the strike, it cannot be said that the Company caused the violence and bloodshed, and therefore must suffer the consequences of this intolerable conduct without recourse. This Court long ago rejected the very same theory now advanced by the Union.

> "Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit.
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> "For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to

seize their employer's plant. We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

"As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure would be to create an anomalous distinction for which there is no warrant. . . ."

National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U.S. 240, 252, 253-254, 83 L. Ed. 627, 633, 634, 59 S. Ct. 490 (1939).

See also: *National Labor Relations Board v. Deena Artware, Inc.*, 198 F. 2d 645 (6th Cir. 1952), cert. de-

nied, 345 U.S. 906, 97 L. Ed. 1342, 73 S. Ct. 644 (1953), and *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F. 2d 637 (6th Cir. 1952), cert. denied, 344 U.S. 897, 97 L. Ed. 694, 73 S. Ct. 277 (1952).

As was expressly recognized by this Court in *Fansteel*, the fact that a company has been found to have committed unfair labor practices, does not render it an outlaw having no recourse to law. For the unfair labor practices, the Board's full range of remedies were imposed upon the Company and complied with in every respect. Substantial injustice would be done if the Union were allowed to impose the violence and its devastating consequences upon the Company as an additional punishment.

CONCLUSION

Upon all of the foregoing, the Respondent earnestly prays the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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